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In The

Supreme Court of the United States

OCTOBER TERM, 1984

DISTRICT OF COLUMBIA,
Petitioner,

v.

KENNETH M. BROWN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INEZ SMITH REID,
Corporation Counsel, D.C.
JOHN H. SUDA,
Principal Deputy Corporation Counsel, D.C.
CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.
Appellate Division
*EDWARD E. SCHWAB,
Assistant Corporation Counsel, D.C.
Attorneys for Petitioner,
District of Columbia
Room 305, District Bulding
14th & Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: 727-6252
**Counsel of Record*

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QUESTION PRESENTED

D.C. Code § 12-309 requires, in order to maintain an action against the District of Columbia for unliquidated damages to person or property, that a claimant must give written notice of his claim to the Mayor of the District of Columbia within six months of his injury or damages.

The question presented is whether the District of Columbia Circuit erred in refusing to apply D.C. Code § 12-309 to constitutional tort actions, under established borrowing principles, because the legislative history and judicial constructions of the provision demonstrate that Congress enacted that requirement for the same policy reasons that statutes of limitations are enacted.

PARTIES

The parties are listed in the caption.

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KENNETH M. BROWN,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The District of Columbia, through the Corporation Counsel, petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The September 4, 1984, *en banc* opinion for the District of Columbia Circuit was written by Circuit Judge J. Skelly Wright, for himself and six other circuit judges (1a-23a). The dissenting opinion was written by Circuit Judge Robert H. Bork, for himself and three other circuit judges (24a-44a). These opinions are reported at 742 F.2d 1498.

The judgment order (later vacated) of the panel was entered on March 24, 1983 (46a). The Memorandum Order of the District Court was entered on September 3, 1981 (47a-49a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1984 (45a). The Chief Justice signed orders extending the time for filing a petition for a writ of certi-

orari to and including December 21, 1984, and to and including January 4, 1985.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

D.C. Code § 12-309, provides:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner [Mayor] of the District of Columbia of the approximate time, place, cause and circumstances of the injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is sufficient notice under this section.

STATEMENT

1. The facts.

On October 19, 1979,[1] respondent Kenneth M. Brown (now known as Yusaf Na'im Salahuddin) filed this action *pro se* in the United States District Court for the District of Columbia. The action was against the District of Columbia, the United States, the United States Attorney General, and

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[1] 42 U.S.C. § 1983 did not become applicable to the District of Columbia until December 29, 1979. Pub. L. 96-179, 93 Stat. 1284.

For that reason this is an action directly under the Constitution, pursuant to the theory of *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A body of law developed in the D.C. Circuit before § 1983 became effective in the District under which *Bivens* actions against the District of Columbia or District officials were treated identically to § 1983 actions elsewhere. See, e.g. *Doe v. District of Columbia*, 225 U.S. App. D.C. 225, 233, 697 F.2d 1115, 1123 (1983); *Boykin v. District of Columbia*, 223 U.S. App. D.C. 80, 83, 85-87, 689 F.2d 1092, 1095, 1097-99 (1982); *Tarpley v. Greene*, 221 U.S. App. D.C. 227, 235-37, 684 F.2d 1, 9-11 (1982). This was recognized in the *en banc* decision in this case (2a-3a, n.1; 4a, n.2), and the Court specifically used the term "constitutional tort" to insure that its decision would also "account for actions under 42 U.S.C. § 1983." (4a, n.2).

various District of Columbia officials.[2] Respondent sought damages against all defendants and injunctive relief relating to his confinement in the Adjustment Unit (a maximum security building) at Youth Center I in the Correctional Complex operated by the District of Columbia at Lorton, Virginia. The only issue before the *en banc* court below and in this petition concerns whether the District's notice of claim statute (D.C. Code § 12-309 (1981)) applies to the damages claims against the District of Columbia for alleged constitutional violations.

Respondent sought damages for allegedly inadequate food, clothing, sanitary conditions, cell space, and educational, religious, legal and rehabilitative services while in maximum security. He also alleged physical assaults by guards and by other inmates. Damages were sought on all claims. The District of Columbia moved for summary judgment on the damages claim against it on the ground that respondent had not complied with the requirement of D.C. Code § 12-309 (1981), that he give notice to the Mayor of his claim against the District within six months of his injury for which he sought damages.

The District Court granted summary judgment to the District[3] because respondent did not provide a notice of claim that complied with the statute. On appeal, respondent argued that D.C. Code § 12-309 (1981) did not apply to federal causes of action such as his constitutional tort claims.

While respondent's appeal was pending in the D.C. Circuit, a panel decided *McClam v. Barry*, 225 U.S. App. D.C. 124, 697 F.2d 366 (1983), which held that § 12-309 does apply to federal damages actions against the District of Columbia. A panel of the court affirmed the District Court's grant of summary judgment on the damages claims against the District based on the holding in *McClam*. Thereafter, the

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[2] On October 20, 1980, the motion of the United States and the Attorney General to dismiss was granted on the ground that they are not involved in operating Lorton. Respondent did not challenge that order on appeal.

[3] The District Court also granted summary judgment on all of respondent's other claims.

circuit court *en banc* vacated the judgment of the panel and reheard the case.

2. The purpose and history of D.C. Code § 12-309.

D.C. Code §12-309 (1981) was enacted by Congress in 1933.[4] This statute requires that, in order to maintain an action against the District of Columbia for unliquidated damages to person or property, a claimant must give notice in writing to the Mayor, within six months of his injury or damages, of the approximate time, place, cause and circumstances of the injury or damages. Section 12-309 provides:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner [Mayor] of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under this section.

A claimant's failure to provide notice required under the statute gives the District of Columbia a complete affirmative defense to any action for unliquidated damages that is filed. *F.W. Woolworth Co. v. Stoddard*, 159 A.2d 229, 231 (D.C. 1959).[5] Section 12-309 only requires that the government be notified of a claim; it does not require suit to be brought against the government any sooner than provided in the applicable 3-year general statute of limitations § 12-301(8) (1981). Nor does § 12-309 affect D.C. Code § 12-302(a) (1981) which provides that the limitations periods which normally govern the bringing of suit are tolled during incarceration as to any cause of action that accrues during a person's imprisonment. D.C. Code § 12-302(a)(3).

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[4] Act of February 28, 1933, 47 Stat. 1370.

[5] See also, *Dellums v. Powell*, 184 U.S. App. D.C. 324, 337, 566 F.2d 216, 229 (1977), *cert. denied*, 438 U.S. 916 (1978).

Thus, the most direct effect of the decision of the circuit court in this case is to permit prisoners to file a damages action at any time during their incarceration and for three years thereafter for any claim that accrues during their imprisonment, without ever having given prior notice of their claims.

The catalyst[6] for § 12-309 was the decision in *District of Columbia v. Leys,* 62 App. D.C. 3, 63 F.2d 646 (1932) *cert. denied,* 289 U.S. 756 (1933), where suit was filed nearly three years after the plaintiff was injured. The District received no notice of the claim prior to the filing of the action, and it was prejudiced in its defense due to the lapse of time. The circuit court recognized this and recommended remedial legislation in the form of a shortened statute of limitations or a statute like § 12-309, that would provide notice to the District. The court also recognized that the purpose served by either of the suggested alternatives would be the same.[7]

Congress recognized when § 12-309 was enacted that there were "[s]imilar statutes in effect in 32 states." House

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[6] See, Senate Report No. 1180, 72d Cong., 2d Sess., p. 2 (Feb. 10, 1933).

[7] In *Leys,* the circuit court stated:

> * * * [O]ur consideration of this cause indicates that the District of Columbia was hampered in its defense by the lapse of time between the injury and the suit, during which no claim was made or notice given of the alleged injury.
>
> *This course,* whether inadvertent or designed, was open to the claimant in the present state of the law, which *leads us to suggest again, as we did at the hearing, a change in the statute of limitations applicable to such cases, or the enactment of a requirement that one alleging himself to be injured as a result of a defective highway or sidewalk must make a sworn complaint thereabout to the District government within some short but reasonable period, in default of which any legal action thereupon shall be barred.*
>
> *Such a requirement would not only enable the District of Columbia to deal with the complaint and prepare its defense while the matter is fresh and evidence available,* but also to safeguard other persons from possible injury by remedying the defective conditions if any were found to exist. [63 F.2d at 648, emphasis added].

Report No. 2010, 72d Cong., 2d Sess. p. 2 (Feb. 11, 1933).[8] The Congressional purpose in enacting this statute was set out in the House Report as follows:

> The purpose of the bill is to protect the District of Columbia against unreasonable claims and to assist it in the defense of the public interest where claims are made within the 3-year statute of limitations but so long after the event that it is impossible for the District of Columbia to obtain evidence for use in litigation which may result.
>
> Numerous instances were recited to the committee in which notice of injury as a result of alleged defective sidewalks, or other conditions, were brought to the attention of the commissioners by a filing of a suit for damages more than two years after the alleged injury occurred.
>
> * * *
>
> It is not intended to reduce the period within which suit may be filed, but the purpose of the bill is to give the District officials reasonable notice of the accident so that the facts may be ascertained and, if possible, the claim adjusted.
>
> * * *
>
> The committee is definitely of the opinion that this legislation is essential to protect the revenues of the District of Columbia from unreasonable suits and that with the amendments offered adequate protection of the rights of individuals is secured and the bill should pass. [p. 1-2].

The District of Columbia courts have repeatedly recognized that the purpose of the statute is to give the District prompt notice of claims so that it could quickly investigate matters which might become stale before the applicable statute of limitations had run, or witnesses had moved, or the circumstances of the injury had become a matter entirely within the knowledge of the plaintiff. E.g., *Washington v. District of Columbia*, 429 A.2d 1362, 1365 (D.C. 1981)

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[8] The circuit court in *Leys* also indicated that notice of claim statutes are "to be found in city charters in Virginia and elsewhere." 63 F.2d at 648.

(en banc); Breen v. District of Columbia, 400 A.2d 1058, 1060 (D.C. 1979); see also, *Dellums v. Powell, supra* at 337, 566 F.2d at 229.

The District of Columbia Court of Appeals has held that § 12-309 applies to all tort actions seeking unliquidated damages. *Breen v. District of Columbia, supra.* In *Breen*, the court stated:

> * * * *The statute is directed, however, at the broader problems of notice, prompt investigation, and proof, not to the nature of the claims.*
>
> * * *
>
> * * * The language of § 12-309 is inclusive. "Most certainly, then, the absence of any legislative history in point should not outweigh the words of the statute." *Souder v. Brennan*, 367 F.Supp. 808, 812-13 (D.C. 1973). *We cannot properly read into § 12-309 a restrictive congressional intention which the statutory language does not reflect and the House Report and debate do not directly acknowledge.*
>
> * * * [W]e are willing to assume that libel and other intentional torts were "not within the specific contemplation of Congress." *Eastern Airlines, Inc. v. C.A.B.*, 122 U.S. App. D.C. 375, 379, 354 F.2d 507, 511 (1965). Nevertheless, "it is no bar to interpreting a statute as applicable that 'the question which is raised on the statute never occurred to the legislature.' " *Id.* (quoting Cardozo, Nature of the Judicial Process 15 (1921)). *We conclude from the broad language used, and from the House Report's emphasis on protecting District revenues, that the congressional concern at the time was a general one: the need for prompt notice of unliquidated damage claims against the District of Columbia.* Accordingly, we cannot agree that § 12-309 should be construed to apply only to claims based on "accident." We hold that D.C. Code 1973, § 12-309 applies as well to actions for injuries arising from intentional torts. [400 A.2d at 1060-61, emphasis added].

3. The en banc decision of the District of Columbia Circuit

In an opinion written by Circuit Judge J. Skelly Wright, the District of Columbia Circuit held, *en banc*, that D.C. Code § 12-309 does not apply to "causes of action that, like this constitutional tort claim, are creations of federal law." (4a, footnote omitted). The court used the phrase "constitutional tort" in its opinion so that its holding would also be applicable to actions under 42 U.S.C. § 1983 (4a, n.2). Thus, although this case is a *Bivens* action, Judge Wright's opinion also established the law for the circuit in § 1983 actions. The court overruled *McClam v. Barry*, 225 U.S. App. D.C. 366, 697 F.2d 124 (1983), which held that § 12-309 applies to constitutional tort actions against the District.

The court's analysis involved two alternative theories under which it could be argued that § 12-309 is applicable to constitutional tort actions. First, § 12-309 could be applied on the basis that it was an intentional limitation by Congress on the right to bring federal causes of action, as well as local actions, for damages against the District of Columbia. Second, it could be borrowed under the same theory that local statutes of limitations are applied in federal civil rights actions to reflect the local balancing of interests in repose (6a).

The court read Congress' intent in enacting § 12-309 as limiting the provision to only local, common law-type claims, stating that Congress had not "intended it [§ 12-309] should burden federal causes of action any more than would an analogous state ordinance" (9a). The court acknowledged the broad language of the provision, but it believed that a limiting construction was necessary in light of the historical context of the provision (7a-8a). It stated that the decision in *District of Columbia v. Leys, supra*, "concerned a 'garden variety' tort suit against the city," and that, because Metropolitan Police reports could fulfill the notice requirement, Congress was concerned about "street accidents and similar events" commonly associated with such reports (7a). The court also believed that "Congress envisioned itself as acting [as] . . . a local legislature" in part because § 12-309

was similar to "municipal notice provisions existing throughout the nation" (8a). The court therefore concluded that § 12-309 was intended to reach only local claims.

The court also analyzed § 12-309 in light of the federal borrowing doctrine required by 42 U.S.C. § 1988, and developed in the decisions of this Court. E.g., *Chardon v. Soto*, 103 S. Ct. 2611 (1983); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). The court construed these decisions to require borrowing only to fill "an egregious gap in a [federal] cause of action" (14a) and to provide "universally familiar procedural aspects of litigation" that are "generally understood as essential to a fair scheme of litigation" (16a). It ruled that borrowing statutes of limitations met these standards but that notice of claims provisions do not.

In distinguishing § 12-309 from a statute of limitations, the court stated:

> No one disputes that if 12 D.C. Code § 309 were applied to a federal cause of action, it would be wholly independent of relevant limitations, tolling, and survival provisions, which would all remain applicable. While these latter provisions all operate to define the point of repose, after which expectations become settled, the notice of claims provision does something different. Of course, if it is not complied with, and there are no grounds for waiver, it bars an action, and thus it acts to create settled expectations; but this is simply a penalty for noncompliance. The provision's function is to compel notice so that the municipal defendant may investigate early, prepare a stronger case, and perhaps reach an early settlement. The need to apply traditional provisions of repose (statutes of limitations, tolling provisions, and survival rules) remains unchanged, since the notice provision has a purpose that is quite distinct.
>
> It is important to our inquiry that a notice of claims provision supplements rather than replaces a traditional statute of limitations and operates in a quite different manner than does such a statute of limitations . . . . [16a][9]

[9] The court also distinguished § 12-309 from limitations provisions by relying on *dicta* in several decisions of the District of

[Footnote continued on next page]

Judge Bork dissented from virtually every aspect of the majority opinion. He construed § 12-309 to be an intentional limitation by Congress on all claims for unliquidated damages, including constitutional tort actions. He relied on the broad language of the provision, the Congressional purpose which he believed would be furthered by applying it to constitutional torts, and on constructions of the provision by the District of Columbia Court of Appeals, especially in *Breen v. District of Columbia, supra.* (24a-28a).

He criticized the majority's limited reading of federal borrowing doctrine, stating there was no basis for finding federal law deficient only if it was missing a universally familiar procedural aspect of litigation and where federal law does not establish a point at which a cause of action ends (28a). He stated:

> The cases establish that federal law should be considered "deficient" and courts should turn to the law of the forum state if federal law does not cover the issue. Deficiency, then, has been, and should be, used only in the sense of a "void in federal law." *Board of Regents v. Tomanio,* 446 U.S. 478, 483-84 (1980). Applying this correct standard, there is clearly a void or deficiency in the common law of constitutional torts that section 12-309 can fill. [29a]

[Footnote continued from previous page]
Columbia Court of Appeals which suggest that the local courts construe § 12-309 as adding an element to a cause of action against the District of Columbia, namely a requirement that a plaintiff prove he gave notice of his claim. (19a-21a). This *dicta* was relied upon despite a square holding that noncompliance with § 12-309 is an affirmative defense which is presented or waived in the same manner as any other affirmative defense. *F.W. Woolworth Co. v. Stoddard, supra,* 156 A.2d at 231; see also *Dellums v. Powell, supra,* 566 F.2d at 229.

The court also relied upon statements in decisions of the District of Columbia Court of Appeals that § 12-309 should be strictly construed because it represents a partial waiver of sovereign immunity (21a-22a). The court then reasoned that it was not required to borrow an element of a federal cause of action from local, Disrict of Columbia law or to recognize any "local" sovereign immunity of the District government (22A).

Alternatively, Judge Bork believed that § 12-309 met even the rigorous borrowing standards established by the majority. As evidenced by the large number of jurisdictions that have enacted similar provisions, there is a widely felt need for notice of claims provisions like § 12-309. This, he stated, meets "the majority's overly restrictive" reading of borrowing doctrine (33a). He also indicated that, given the special need of municipal governments in dealing with a large volume of civil litigation and damages claims, such provisions were fair and met legitimate needs of local government.[10]

Judge Bork also indicated that the purposes and policies underlying § 12-309 demonstrated that borrowing is appropriate. These purposes are the same inportant purposes of statutes of limitations, namely, ensuring freshness of evidence and "defining 'the point of repose . . . after which expectations become settled' " notice of claims provisions represent a "legislative ' value judgment concerning the point at which the interests in protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.' " (34a). He said:

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10 Judge Bork stated:

> A municipality needs a notice period that is shorter than the ordinary statute of limitations. For one thing, given the very wide range of services and facilities used by the public that a municipality provides, a municipality has many more ways of injuring persons or property without knowing that it has done so than does any particular agent of the municipality or any individual or business. Because of the extensive and segmented bureaucracy that the provision of so many and so varied services and facilities requires, a city, particularly a major city like Washington, D.C. will often not receive timely and adequate notice of a likely claim from its own employees, even assuming that there is an employee who knows of a likely claim. The one person who is sure to know is the individual who thinks the city has in some tortious way injured his person or property. It makes eminent good sense, then, to require notice to the city within six months so that the facts may be investigated before they go stale, good claims paid, marginal claims compromised, and worthless claims shown to be such. [36].

> Section 12-309 gives the city assurance that, if it has learned of only certain claims for the prior six months, it may proceed in the settled expectation that there are no additional outstanding potential liabilities. Knowing its potential exposure, the city may then deal, by investigation, settlement, or litigation with the population of claims as to which it has received notice. [34a].

He criticized the majority for losing sight of these purposes and for characterizing § 12-309 as a condition precedent to filing suit. He believed this characterization masked "the purpose of the statute and the policies it serves" (35a).

> . . . [T]his is merely playing with words. The point is that section 12-309 serves the same purpose as a statute of limitations, and that requiring notice within six months is no more "burdensome" on federal interests than is mandating filing within a limitations period. A notice-of-claims provision goes to the remedy in the same way that a statute of limitations does. Any attempt to view it as an element of the cause of action is logically indistinguishable from viewing a statute of limitations that way, too. [35a, footnote omitted].

REASONS FOR GRANTING THE WRIT

1. The applicability of local notice of claims provisions to constitutional torts is of great importance to the District of Columbia and other local gorernments.

This case has exceptional importance to the District of Columbia government, because the *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit has drastically altered limitations policies applicable to unliquidated damages claims in constitutional tort actions against the District of Columbia. The decision has upset claims procedures that the District Government has used for nearly fifty years, and makes it possible for litigants to assert claims against the District where it is highly doubtful that the District can collect evidence to defend those legal actions. The case

also has national importance, due to the broad acceptance of notice of claims provisions like D.C. Code § 12-309 (1981).

The notice of claims provision in this case, § 12-309, requires that, in order to maintain an action against the District of Columbia for unliquidated damages to person or property, a claimant must give notice in writing to the Mayor, within six months after his injury or damages, of the approximate time, place, cause, and circumstances of the injury or damages.

In refusing to borrow § 12-309 in constitutional tort litigation, the circuit court has exposed the District to a large number of stale claims and seemingly makes it impossible for the District to establish any claims system that could reasonably meet its needs — given the large volume claims asserted against it and the amount of litigation to which it is a party.

The facts of this case, which involves a *pro se* prisoner complaint, are especially useful in illustrating the difficulties the District will face. Applicable limitations and tolling principles toll the running of the statute of limitations during the period of confinement for any claim that accrues during a prisoner's incarceration. D.C. Code §§ 12-301(8), 12-302(a)(3) (1981). Thus a prisoner has the entire period of his incarceration plus three years to file a constitutional tort action relating to his confinement. § 12-301(8). In the meantime, he need not provide any notice of his claim and can wait for many years, possibly decades, before any notice is provided. By contrast, if § 12-309 were applicable to such cases, a prisoner would have to provide notice of his claim within six months of his alleged injury or damages. He would still have the same period to file suit, but the District would be permitted to investigate his claim and keep a record of it in the event of litigation.

The magnitude of the record-keeping burden that the decision of the circuit court has placed on the District of Columbia in prisoner cases alone is obvious. The District will have to

keep detailed records concerning its individual prisoners and the operation of its prisons, possibly for decades, because it has no way of knowing whether any of its long term prisoners will file suit upon their release . Nor can it determine in advance of any such lawsuit which of its records might be relevant. Accordingly, it cannot selectively retire or destroy its records.[11]

The case is equally important for what it portends for other municipal governments in wake of *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978). *Monell*, in overruling prior precedent to the contrary,[12] held that municipal governments are "persons" within the meaning of 42 U.S.C. § 1983 and amenable to damages actions for constitutional torts. Since *Monell*, this Court has noted that the contours of municipal liability under § 1983 are "currently in a state of evolving definition and uncertainity." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981), citing *Owen v. City of Independence*, 445 U.S. 622 (1980). There is a great need to define the significance of local notice of claims provisions for such municipal liability.

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[11] We do not mean to suggest that problems will not be equally great regarding other classes of litigants. As a direct result of the decision below, minors will be able to withhold presentation of any constitutional tort claims for the entire period of their minority plus three years. The six month period of § 12-309 runs against minors in asserting claims under District of Columbia law. *Gwinn v. District of Columbia*, 434 A.2d 176 (D.C. 1975). This is common, because in most states municipal notice of claim statutes are applicable to minors. 59 A.L.R.3d 93, 119-122. Similarly, the notice provision of the Federal Tort Claims Act also applies to minors. 28 U.S.C. § 2401 (b); *Leonhard v. United States*, 633 F.2d 599, 624 (2d Cir. 1980); *cert. denied*, 451 U.S. 908 (1981).

The District of Columbia Court of Appeals has construed § 12-309 as placing an outside limit of six months in all cases on providing notice of claims. *Breen v. District of Columbia, supra*, 400 A.2d 1060-61. That period can be extended only in cases presenting strong reasons for equitable tolling. See *Kelton v. District of Columbia*, 413 A.2d 919, 921 (D.C. 1980); *Dekine v. District of Columbia*, 422 A.2d 981, 985 n.8 (1980).

[12] *Monroe v. Pape*, 365 U.S. 167 (1961).

Many commentators have noted that notice of claim statutes are the most generally recognized means of meeting the special needs of municipal governments in defending against tort actions. Such statutes are the "most common" special procedural requirement for asserting tort claims against municipal governments. Prosser and Keeton, *Law of Torts* § 131 at 1055 (1984). In its most recent revision, the leading work on municipal corporations has devoted more than 90 pages to a discussion of notice of claims provisions. 18 McQuillan, *Law of Municipal Corporations*, § 53.151 *et seq.* (3d Ed., 1984 Rev.).[13] Judge Wright and all the other judges on the District of Columbia Circuit recognized that "municipal notice provisions" exist "throughout the nation." (8a, 32a-33a). The general acceptance of these provisions by state and local governments, and the refusal by the District of Columbia Circuit, for that very reason, to apply § 12-309 to constitutional tort litigation, demonstrate the importance of this issue and the need for a decision from this Court.

As Judge Bork's opinion below sets forth, the District and other municipal governments have a special need for early notice of claims against them so that they can investigate those claims and prepare for litigation. Notice of claims provisions, like § 12-309, are a widely accepted response to those needs. We do not see any other legislative solution to this problem that is not likely to meet the same fate as § 12-309, based on the authority of the *en banc* decision in this case.

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[13] Other commentators and authorities have recognized the broad acceptance of notice of claim statutes that are similar to § 12-309 and protect other municipal governments. See, 4 Sands, *Local Government Law*, § 27.15 (1982); Elliot, *Municipal Corporations*, § 247 (1925); 4 Dillon, *Municipal Corporations*, § 161 (5th ed. 1911); Annot., 59 A.L.R.3d 93 (1974); 56 Am. Jur.2d *Municipal Corporations*, §§ 680 *et. seq.* (1971); 63 C.J.S. *Municipal Corporations*, §§ 923-930 (1950). Congress itself reflected this widespread acceptance when it modeled the claims provisions of the Federal Tort Claims Act after "the numerous precedents in s[illegible]tes governing tort claims against municipalities." Senate Report No. 127, 89th Cong. 2d Sess., p.3 (June 24, 1966); House Report No. 1532, 89th Cong. 2d Sess., p.7 (May 16, 1966).

For the circuit court here has clearly indicated that in its view there is no legitimate reason to differentiate municipal governments from other § 1983 defendants. Review is warranted on this basis alone.

2. The decision below conflicts with decisions of the courts of last resort in New York and Alabama.

The decision of the District of Columbia Circuit is in conflict on the federal question decided with the decisions of the courts of last resort of two states which have held that notice of claims statutes establish limitations periods that are applicable to cases brought in state courts under 42 U.S.C. § 1981 or § 1983. *Mills v. County of Monroe*, 59 N.Y.2d 307, 451 N.E.2d 456 (1983), *cert. denied*, 104 S.Ct. 551 (1983); *Stewart v. City of Northport*, 425 So.2d 1119 (Ala. 1983).

Mills involved a ninety day notice of claim statute applicable to county governments in New York state. The Court of Appeals held that borrowing this provision, by virtue of 42 U.S.C. § 1988, was required in an action under 42 U.S.C. § 1981, under principles set out by this Court in *Johnson v. Railway Express Agency, supra.* 451 N.E.2d 457-458. The court stated:

> In *Johnson v. Railway Express* (supra), the court noted that "[i]n borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." (*Id.*, at p. 464). The notice of claim requirements in this State serve an important State interest. Requiring notice allows a governmental subdivision a meaningful opportunity to investigate in a timely manner the circumstances that gave rise to a claim. " 'The requirement of notice is one of the safeguards devised by the law to protect municipalities against fraudulent and stale claims for injuries to person and property' " (see *Sandak v. Tuxedo Union School Dist. No. 3*, 308 N.Y. 226, 232, 124 N.E.2d 295, quoting Tenth Ann. Report of N.Y. Judicial Council, 1944, p. 265). Therefore, the general restrictive effect of a State notice of

> claim requirement does not of itself bar its application to Federal civil rights actions. [*Id.* at 457-58].

The Court of Appeals of New York applied its notice of claim provision in part because of the flexibility in its application, which made it subject to waiver in some circumstances. *Id.* at 458. The circuit court here stated that this flexibility in application partially distinguished *Mills* from this case. (23a, n.6). However, Congress chose the six month period of § 12-309 to account for the same types of problems that have caused the New York courts to inject flexibility into the application of their 90 day notice statute. (See, Comments of Rep. Palmisano, 76 Cong. Rec. 3988 (Feb. 13, 1933)). The holding in *Mills* would not survive the rationale of the circuit court in this case and for that reason is in direct conflict with the decision of the circuit here.

In *Stewart v. City of Northport, supra,* the Supreme Court of Alabama applied its six month notice of claim provision "for damages growing out of torts" to an action under 42 U.S.C. § 1983, on the theory that it is a statute of limitations. *Id.* at 1121-22. The Alabama statute is identical to § 12-309 in all respects relevant to this case. Notice could be presented to a City Clerk within six months, and the claimant then had a longer period to file suit that was dictated by another limitations provision, or he could file suit within six months with the lawsuit constituting notice to the city. *Id.* Compliance with § 12-309 is also possible in this manner.

> 3. The decision below is wrong: Section 12-309 applies to constitutional tort claims because it represents a legislative judgment concerning the period within which all unliquidated damages claims must be asserted aganist the District of Columbia, and because applying § 12-309 is not inconsistent with the federal policies underlying constitutional torts.

The refusal of the *en banc* court through federal borrowing principles to apply D.C. Code § 12-309 in this constitutional tort action is directly contrary to controlling decisions of this Court. This notice of claims provision should be bor-

rowed for any of three alternative reasons: (1) it is a limitations period; (2) it is so interrelated with the chronological length of the applicable limitations period that it must be borrowed with it; and/or (3) it is an important, generally recognized, procedural device to protect the District in litigation and should be borrowed without regard to whether it is a limitations period or interrelated with one.

It has been settled for many years that the federal courts must apply local statutes of limitations in civil rights litigation where Congress has not specified periods of limitation. *O'Sullivan v. Felix.*, 233 U.S. 318 (1914). See also, *Runyon v. McCrary*, 427 U.S. 160, 179-82 (1976). Where "there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action. . ., the controlling period would ordinarily be the most appropriate one provided by state law. *Johnson v. Railway Express Agency, supra*, 421 U.S. at 462.[14] In other words, it is that "which the State would apply had the action been brought in a state court." *Burnett v. Grattan*, 104 S.Ct. 2924, 2929 (1984).

In addition to borrowing the period of limitations, other statutes that are "interrelated" with the "chronological length of the limitation" must also be borrowed; these include "provisions regarding tolling, revival, and application" of the limitations provision. *Johnson v. Railway Express Agency, supra* at 485-86. In *Tomanio*, the Court stated:

> "a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be

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[14] Similarly in *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946), the Court stated:

> * * * Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. * * * The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general frame work of familiar legal principles.* * * [citations omitted]

> circumvented if possible. In most cases, they are binding rules of law." [*Id.* at 484].

The policy behind borrowing local limitations and related policies is reliance on "the State's wisdom in setting a limit, and the exceptions thereto, on the prosecution of a closely analogous claim." *Id.* at 486. The only exception to the borrowing doctrine is where state limitations policies are "inconsistent with the federal policy underlying the cause of action under consideration." *Johnson v. Railway Express Agency, supra* at 465.

Section 12-309 provides that a claimant must give notice of his claim in writing to the Mayor, within six months of his injury or damages, in order to maintain an action against the District. This section reflects important policies established by Congress concerning the time period during which the District must be given notice of damage claims. They are essentially the same policies as are reflected in statutes of limitations.

The legislative history to § 12-309 reflects that a primary purpose is to give the District notice so that it can collect and preserve evidence. The House Report states the section's purposes are:

> to protect the District of Columbia against unreasonable claims and to assist it in the defense of the public interest *where claims are made* within the * * * statute of limitations but *so long after the events that it is impossible for the District of Columbia to obtain evidence for use in litigation which may result.* H.R. Rep. No. 2010, 72d Cong., 2nd Sess., 1 (1933) (emphasis supplied).

The importance of these purposes is manifest in light of the thousands of claims (many of which are constitutionally based) that are filed against the District each year.

> Such statutes "promote justice by preventing surprises through the revival *of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared.*

Burnett v. Central R.R. Co., 380 U.S. 424, 428 (1965), quoting *Order of Railroad Telegraphers v. Railway Express Agency,*

321 U.S. 342, 348-349 (1944) (emphasis supplied). Section 12-309 serves the same policies. It plainly reflects the judgment of Congress that a delay in excess of 6 months in asserting a claim for unliquidated damages against the District of Columbia is likely to impair the ability of the District to ascertain the facts and prepare an adequate defense. See *District of Columbia v. Leys, supra*, 63 F.2d at 648. Accordingly, § 12-309 should apply to constitutional tort claims in the same way that any other local limitations period would apply.

The limited circumstance in which a federal court need not follow the local limitations policy or statute is where "its application would be inconsistent with the federal policy underlying the action under consideration." *Johnson v. Railway Express Agency, supra* at 465; *Board of Regents v. Tomanio, supra* at 487. The federal policies relevant here would seem to be those underlying *Bivens*-type actions. One of those policies is the policy of compensation, namely, that a person whose constitutional rights are violated ought to be able to redress his injury through a suit for money damages against the person responsible for the violation. See *Bivens, supra* 403 U.S. at 388. Another is the policy of deterring persons from engaging in acts which violate the constitutional rights of others. Neither of these two policies is significantly undercut by the application of § 12-309 because persons such as respondent "can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by" complying with the notice provisions of § 12-309 prior to commencing suit. *Board of Regents v. Tomanio, supra*, 446 U.S. at 488 (1980).

Moreover, Congress has made other similar decisions in more recently enacted Civil Rights legislation. Indeed, the result of applying § 12-309 would be quite similar to what Congress has required in most of the civil rights statutes it has enacted in this century, in that it would require notice of a claim in a matter of months but, if such notice is provided, suit can be bought for several years thereafter. See e.g., *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 335 (1977)

(If notice is given within 6 months, action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, can be brought years later); cf. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979) (Similar requirements under Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*); *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 103-104, n. 10 (1979) (Similar requirements may have been intended under Fair Housing Act of 1968, 42 U.S.C. §§ 3610 *et seq.*)

In this regard, the Court in *Zipes v. Trans World Airlines*, 455 U.S. 385, 393-96 (1982) held that the Title VII charge-filing time limits, set forth in 42 U.S.C. § 2000e-5(e), were in the nature of statutes of limitations, and that the "particular purpose" of those requirements was "to give prompt notice" to the employers.[15] The Court made it even clearer that such charge-filing provisions are essentially statutes of limitations in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 2289-94 (1983). There the Court adpoted the six-month charge-filing period for filing unfair labor practices with the National Labor Relations Board[16] as the appropriate statute of limitations for an employee's actions against his employer and union alleging breach of the collective bargaining agreement and breach of the union's duty of fair representation in an arbitration.

It is true that Section 12-309 does not determine the time within which suit must be brought, while statutes of limitations normally do. However, after the decisions in *Zipes* and *Del Costello*, it is clear that such periods for filing charges with an administrative agency are appropriately treated as a statute of limitations even though they do not in terms limit the time during which a legal action can be filed. After

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[15] Thus, D.C. Code § 12-309 (which has wording similar to that found in 42 U.S.C. § 2000e-5(e) with regard to the contents of the notice) and 42 U.S.C. § 2000e-5(e) share the purpose of providing "prompt notice" to the alleged wrongdoer. This, of course, is the same purpose served by statutes of limitations.

[16] Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

these decisions, the question of whether a notice provision should be treated as a statute of limitations for purposes of applying it to federal claims must clearly be determined by reference to the primary purpose of the notice provision in question. The primary purpose of § 12-309 is to protect the District of Columbia against prejudice caused by delay in having claims submitted to it. Since that is the same purpose served by statutes of limitations, § 12-309 should be treated as such for federal borrowing purposes.

Even assuming, however, that § 12-309 is not itself a limitations period for borrowing purposes, it is so closely "interrelated" with the "chronological length of limitation" that it must be borrowed; it is a provision which concerns the application of the limitations period. *Johnson v. Railway Express Agency, supra* 421 U.S. at 463-64; *Board of Regents v. Tomanio, supra* 446 U.S. at 485-86. As previously indicated, the two options set out in *District of Columbia v. Leys, supra,* were shortening the period of limitations or enacting a notice of claims provision. (See discussion of legislative history, *supra* at 5-7.) Congress chose to enact a notice provision. However, the fact that Congress considered these two alternatives as means to the same end illustrates how closely related § 12-309 is to chronological periods of limitations.[17] In light of this close relationship of § 12-309 to the chronological length and application of the period of limitations, § 12-309 must be borrowed along with the period of limitations just like tolling principles must also be borrowed. *Chardon v. Soto,* 103 S. Ct. 2611, 2618 (1983); *Board of Regents v. Tamanio, supra.*

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[17] The close interrelationship between § 12-309 and the three year statute of limitations (applicable to this case) is also reflected in the District of Columbia Court of Appeals decision in *Breen v. District of Columbia,* 400 A.2d 1058 (D.C. 1979). There, the court stated that in enacting § 12-309

> . . . Congress as well as the federal circuit court in *Leys, supra,* was reacting primarily to the burden on the city from the three-year statute applicable, for example, to cases involving unlawful detention of personal property, damage to real or personal property, and negligent injury to the person. See D.C. Code 1973, § 12-301(2), (3), and (8).

Finally, § 12-309 should be borrowed, if for no other reason, because notice provisions, or other similar procedural devices for processing tort claims by municipal governments, are in such common use and are so generally recognized as needed.[18] There is certainly no obstacle to bringing "the prevailing view" on "general tort law" into § 1983 actions or other constitutional tort actions. *Smith v. Wade*, 461 U.S. 30, 34 n.2 (1983). The "prevailing view" has been considered in other aspects of municipal tort liability. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 n.21 (1981). It should control here.

CONCLUSION

The petition for a writ of certiorari, to review the decision of the United States Court of Appeals for the District of Columbia Circuit, should be granted.

INEZ SMITH REID,
Corporation Counsel, D.C.

JOHN H. SUDA,
Principal Deputy Corporation Counsel, D.C.

CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.
Appellate Division

*EDWARD E. SCHWAB,
Assistant Corporation Counsel, D.C.

Attorneys for Petitioner,
District of Columbia
Room 305, District Bulding
14th & Pennsylvania Ave., N.W.
Washington, D.C. 20004

**Counsel of Record*

[18] See note 13, *supra* and text.

APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2083

KENNETH M. BROWN, APPELLANT

Riggie A. Lott and All Other Inmates That Have Been Subject to the Conditions in the Adjustment Unit

v.

UNITED STATES OF AMERICA, *et al.*

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 79-02809)

Argued *En Banc* November 7, 1983

Decided September 4, 1984

Anne Shere Wallwork (appointed by this court) for appellant.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Edward E. Schwab, Assistant Corporation Counsel, with whom *Charles L. Reischel*, Deputy Corporation Counsel, was on the brief, for appellee District of Columbia. *Leo N. Gorman*, Assistant Corporation Counsel, entered an appearance for appellee District of Columbia.

Before ROBINSON, *Chief Judge*, and WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, and STARR, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT, in which *Chief Judge* ROBINSON and *Circuit Judges* WALD, MIKVA, EDWARDS, GINSBURG, and SCALIA join.

Dissenting opinion filed by *Circuit Judge* BORK, in which *Circuit Judges* TAMM, WILKEY, and STARR join.

WRIGHT, *Circuit Judge*: On October 19, 1979, Yusaf Na'im Salahuddin (then known as Kenneth M. Brown), an inmate of the District of Columbia's reformatory at Lorton, Virginia, filed suit in the United States District Court for the District of Columbia. The suit alleged that conditions in the reformatory's "Adjustment Unit," where the plaintiff had previously been incarcerated, had unconstitutionally deprived inmates of adequate food, clothing, sanitary conditions, cell space, and educational, religious, legal, and rehabilitative services, and had failed to protect them from physical assault by guards and other inmates. The suit originally sought declaratory and injunctive relief as well as damages, and it named as defendants a number of District of Columbia and federal officials and the District of Columbia itself. Here, we are concerned only with the claim seeking damages from the District of Columbia (the District).[1]

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[1] This action was brought directly under the Constitution pursuant to the theory of *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Although after the filing of this action Congress amended 42 U.S.C. § 1983 to include actions taken under color of District of Columbia law, *see* Pub. L. No. 96-170, § 1, Dec. 29, 1979, 93 STAT. 1284, prior to that amendment § 1983 did not apply to D.C. government actions. *See District of Columbia v. Carter*, 409

The District Court, on September 2, 1981, granted a summary judgment motion filed by the District. The part of the District Court's order that concerns us is its holding that the notice of claims provision in the District of Columbia Code, 12 D.C. Code § 309 (1981), applied to plaintiff's action for unliquidated damages against the District.

In relevant part, 12 D.C. Code § 309 provides:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner [Mayor] of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage. * * *

Because plaintiff had not filed any notice that would comply with 12 D.C. Code § 309, the District Court granted summary judgment as to the damage action. Plaintiff appealed and argued that Section 309 did not apply to federal causes of action such as his constitutional tort action.

While the appeal was pending, a panel of this court decided *McClam v. Barry*, 697 F.2d 366 (D.C. Cir. 1983), which held that Section 309's six-month notice of claims requirement *does* apply to federal damage actions against the District. In light of *McClam*, a panel of this court affirmed the District Court's grant of summary judgment with respect to the damage claims against the District. On May 19, 1983, this court granted reconsideration *en banc* and vacated the judgment of the panel.

U.S. 418 (1973). That a constitutional tort claim based on events before the amendment could be based on *Bivens* is clear. *See, e.g., Doe v. District of Columbia*, 697 F.2d 1115 (D.C. Cir. 1983); *Tarpley v. Greene*, 684 F.2d 1 (D.C. Cir. 1982).

We now hold that *McClam v. Barry* was in error in holding that the six-month notice of claims provision of Section 309 applies to causes of action that, like this constitutional tort claim,[2] are creations of federal law.

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[2] Although this action is only under a *Bivens* theory, the broader phrase "constitutional tort" will usually be used in this opinion to account for actions under 42 U.S.C. § 1983. Both sides agree that for purposes of the issues in this case there are no relevant differences between the two types of actions and that precedents from § 1983 law are important to the analysis of this case. "The bodies of law relating to the two forms of litigation have been assimilated in most * * * respects." *Doe v. District of Columbia, supra* note 1, 697 F.2d at 1123.

At times, precedents from one body of law have not been applied to the other. *See, e.g., Carlson v. Green*, 446 U.S. 14, 24 n.11 (1979). The case for such an assimilation, however, is especially strong in a case such as appellants', where the federal entity is, in effect, a local government that is locally administered (*i.e.*, the District of Columbia). First, local governments are usually subject to 42 U.S.C. § 1983 suits, and thus to apply § 1983 precedents to *Bivens* actions against the District is simply to treat the District like other municipalities. This seems reasonable where there are no federal interests arguing for different treatment. Second, Congress has, in its subsequent amendment to § 1983, *see* note 1 *supra*, made the determination that the District should be treated like other municipalities for purposes of constitutional tort litigation. Third, some of the reasons that have in the past argued for treating *Bivens* actions outside the District differently from § 1983 actions related to the national character of the federal entities challenged in the *Bivens* actions. In *Carlson*, for example, the Court refused to apply a state survival of actions rule to a *Bivens* action against the administrators of the Federal Bureau of Prisons. Among the reasons given by the Court was the need for a uniform federal rule to govern a centrally administered nationwide federal bureaucracy that otherwise might order its affairs to take advantage of differences in state laws. Such concerns seem much less relevant where the federal entity is a local government whose entire operation is subject to the same "local" law.

I. THE DECISION IN *McClam v. Barry*

To resolve the issue whether 12 D.C. Code § 309 should apply to federal causes of action, the *McClam* court correctly focused its inquiry on two possible approaches. First, it asked whether Congress, when it enacted Section 309, meant for that section to apply to federal causes of action. 697 F.2d at 369. But it also realized that even if Congress had no such explicit intent the section might still be applicable to federal actions because federal law does at times borrow state legal provisions to complement federal law. Thus, as a second inquiry *McClam* asked whether application of Section 309 was "supported by the rationale of the rule * * * requiring application of local statutes of limitations to claims based on federal laws that specify no limitations period." *Id.* at 370.

We agree that these inquiries are the proper ones. That we make two inquiries reflects the existence of two available rationales that could justify applying Section 309 to federal causes of action: First, that Congress may have intended Section 309 itself to alter the normal rules applicable to federal causes of action, and second, that those normal rules themselves may take account of Section 309 just as they take account of certain other provisions of local law.

The first inquiry thus rests entirely on a rationale of actual congressional intent: Congress, the author of national legislation, may at times intend that its District of Columbia legislation modify national policies with respect to the District of Columbia. The second inquiry begins with an alternative view of congressional intent: Congress, which is constitutionally responsible for providing a comprehensive body of local law for the governance of the District of Columbia, may see itself as passing local legislation akin to that which any other local legislature might pass. The rationale for applying the provision

then rests on established judicial practices concerning when state or local provisions of law should be used as rules of federal law. This approach is in part a judicial positing of congressional intent and in part an examination of the provision's role in state and local law. For example, the rule that federal law borrows from local law when there is no federal statute of limitations in part "rests on deference to the local balancing of interests embodied in statutes of limitations—a balancing of the interest in allowing the prosecution of valid claims against the interest in preventing the prosecution of claims that, because of delay, cannot be fairly litigated." *Id.* at 370 (*citing Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980); *Johnson v. Railway Express Agency*, 421 U.S. 454, 464 (1975)).

The *McClam* court apparently concluded that either of the two inquiries would justify the applicability of Section 309 to federal actions. In answer to the first, it concluded that "the D.C. Code provision was an intentional limitation [by Congress] on the right to bring even federal causes of action for damages against the District of Columbia." 697 F.2d at 369. In answer to the second, *McClam* concluded that "[t]he same balancing of interests lies behind the D.C. Code notice provision" as lies behind traditional state statutes of limitations, *id.* at 370, and that Section 309 should thus be borrowed so that federal law as applied in the District of Columbia would reflect that local balance.

While we agree that *McClam* made the right inquiries, we disagree with each of its answers.

II. Congressional Intent and 12 D.C. Code § 309

12 D.C. Code § 309 was enacted by Congress in 1933, at least partially in response to this court's *en banc* decision and recommendation in *District of Columbia v. Leys*, 63 F.2d 646, 648 (1932) (on rehearing), *cert. denied*, 289 U.S. 756 (1933). *See* Pub. L. No. 72-385,

47 STAT. 1370 (1933). The language and purposes of the statute were broad. As *McClam* points out, the language contains no limitations regarding the types of actions covered. 697 F.2d at 369. Similarly, the Act's stated purposes—to provide the District an opportunity to investigate claims when all evidence is still fresh, to allow the District to seek out early settlement of meritorious claims, and generally to protect the District's revenues from unreasonable suits—would certainly be fulfilled all the more by giving the Act as broad a reading as its language would allow. *See id. See generally* H.R. REP. No. 2010, 72d Cong., 2d Sess. (1933) (describing purposes of Act). We do not, however, find these factors conclusive; other factors argue for a narrower view.

Nothing in the history of the Act indicates that Congress ever considered the question whether the Act should apply to federal actions. The *Leys* opinion, which urged the Act's passage, concerned a "garden variety" tort suit against the city; the plaintiff had slipped on a defective sidewalk and brought suit long after the event. Similarly, the report accompanying the bill described the problem to be rectified as that of "[n]umerous instances * * * in which notice of injury as a result of alleged defective sidewalks, or other conditions, were brought to the [city's] attention * * * by a filing of a suit for damages more than two years after the alleged injury occurred." H.R. REP. No. 2010, *supra*, at 1. The conclusion that Congress was motivated by the municipality's potential liability for everyday torts is strengthened by the fact that a provision was added which allowed written Metropolitan Police reports to fulfill the notice requirement of the Act. Such reports would have been commonly associated with street accidents and similar events.

None of this discussion is meant to imply that the scope of Section 309 should be limited to the sorts of

"garden variety" negligence actions described above. We do not question the subsequent cases that have given it a far broader application. *See, e.g., Breen v. District of Columbia,* 400 A.2d 1058 (D.C.C.A. 1979) (applying Section 309 to intentional torts). The point is, however, that there is no evidence that Congress envisioned itself to be acting as other than a local legislature protecting a municipality from the threat of excessive common law tort liability. Not only was the problem that Congress discussed one of routine municipal administration—with no reference to the "unique" or "national" character of the District—but in its legislative history the Act is explicitly analogized to similar legislation passed in the states to govern other municipalities.

The analogy to municipal notice provisions existing throughout the nation was raised by this court when it first suggested congressional passage of the already introduced notice provision. The *Leys* opinion argued that "[p]rovisions of this character appear to be included in [the] bill recently introduced into [Congress], and are to be found in city charters in Virginia and elsewhere." 63 F.2d at 648. Congress similarly equated the provision with laws commonly passed by state governments. The report accompanying the bill pointed out that "[s]imilar statutes are in effect in 32 States" and sought to justify the length of time allowed for giving notice by comparing it to the provisions in effect in "other jurisdictions." H.R. REP. NO. 2010, *supra,* at 2. All of this persuades us that Congress simply saw itself to be acting as a local legislature when it passed Section 309.

Under the Constitution, Congress has authority to act as the local legislature for the District of Columbia, and thus Congress frequently enacts legislation applicable only to the District and tailored to meet local needs. Absent evidence of contrary congressional intent, such enactments should be treated as local law, interacting with federal law as would the laws of the several states.

See, e.g., Sullivan v. Murphy, 478 F.2d 938, 971-973 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973). Therefore, we do not interpret the Congress that passed this apparently local legislation as having intended that it should burden federal causes of action any more than would an analogous state ordinance.

III. Federal "Borrowing" Doctrine

A. *An Overview of the Doctrine*

The central claim of the District is that even if 12 D.C. Code § 309 is best understood as purely local law, courts should "borrow" it as a rule of federal law when the District is sued. The doctrine of federal borrowing of local law is well established. To effectuate the goals of federal law, courts, when faced with deficiencies in federal schemes, look to other sources of law to "borrow" appropriate provisions. As the Supreme Court has said: "There will often be no specific federal legislation governing a particular transaction * * *. But silence * * * in federal legislation is no reason for limiting the reach of federal law * * *. [T]he inevitable incompleteness [of federal enactments] means that interstitial federal lawmaking is a basic responsibility of the federal courts." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973).

One of the principal sources of law that courts turn to to fill the deficiencies in federal schemes is state law. For example, where a federal action contains no statute of limitations courts ordinarily look to state law as a possible source of federal law. *See generally DelCostello v. Int'l Bhd of Teamsters*, —— U.S. ——, 103 S.Ct. 2281 (1983). Where it would be consistent with the federal policies underlying the action, courts borrow the most appropriate state limitations provisions. *See Burnett v. Grattan*, —— U.S. ——, ——, 52 U.S.L.W. 4916, 4918 (June 27, 1984); *Johnson v. Railway Express Agency, supra*, 421 U.S. at 462, 464. Indeed, courts have borrowed not

only the limitations provisions themselves, but also state tolling policies, which "are * * * integral part[s] of a complete limitations policy" and which thus give the limitations provisions their meaning under state law. *Tomanio, supra*, 446 U.S. at 488. State provisions other than statutes of limitations and tolling policies, but analogous to them, have also been borrowed to fill gaps in federal law, *see, e.g., Robertson v. Wegmann*, 436 U.S. 584 (1978) (borrowing state survivorship of actions rule), though the practice has been less common and the courts have been somewhat less consistent. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 829 (2d ed. 1973) (apart from statutes of limitations and their incidents, "[t]he authorities are extremely sparse" concerning the extent to which state " 'procedural' and 'quasi-procedural' rules[,]" particularly those "which may affect outcome[,]" should be borrowed); *id.* at 199-200 (Supp. 1981) (discussing the inconsistent results in cases concerning the extent of borrowing state procedural provisions other than "statutes of limitations and their incidents"); *see also* Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 91-94 (1955) (reasons for applying state procedural law are usually weak when dealing with rules other than statutes of limitations).

These borrowing practices are the result of at least two considerations. First, as mentioned above, they reflect the fact that federal law is frequently "deficient" in that it does not supply the complete legal framework necessary to the fair adjudication of federal causes of action. Although federal law may establish rights, and rights of action for the vindication of those rights, federal law does not always include all the " 'procedural' or 'quasi-procedural' " elements that are generally considered necessary to the fair litigation of its causes of action. Where these are absent, it certainly cannot be assumed that the interests normally embodied in those elements

were intended to play no part in the federal scheme. *See DelCostello, supra,* —— U.S. at ——, 103 S.Ct. at 2287 (where there is no statute of limitations, "we do not ordinarily assume that Congress intended that there be no limit on actions at all"); *Tomanio, supra,* 446 U.S. at 488 (the absence of a statute of limitations cannot be understood as placing policies of repose in disfavor); *see also* Hill, *supra,* 69 HARV. L. REV. at 91-92. Thus the courts are faced with the necessity of formulating some rule to fill the deficiency in the federal scheme and thereby to effectuate federal policy. In this context, the borrowing doctrine is the alternative to judicial formulation of a uniform federal rule.

The borrowing doctrine also rests on deference to the balances that local law has struck with respect to the interests normally embodied in the elements necessary to, but absent from, the federal scheme. *See Johnson v. Railway Express Agency, supra,* 421 U.S. at 463-464 ("[A]ny statute of limitations * * * reflects a value judgment concerning the point at which the interests in * * * protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. * * * In borrowing a state period of limitation * * *, a federal court is relying on the State's wisdom * * *."); *McClam v. Barry, supra,* 697 F.2d at 370. With respect to certain statutes, Congress has explicitly codified this borrowing doctrine. *See* 42 U.S.C. § 1988 (1982) (courts should look to state law when federal law is not "suitable to carry [the policies of the Reconstruction Era civil rights statutes] into effect" or when those statutes "are deficient in the provisions necessary to furnish suitable remedies," so long as rules of state law are not inconsistent with policies embodied in federal law); *Burnett v. Grattan, supra,* —— U.S. at ——, 52 U.S.L.W. at 4918; *Johnson v. Railway Express Agency, supra,* 421 U.S. at 464 (linking 42 U.S.C. § 1988 to general federal borrowing practices); *see also Tomanio, supra. But see* Eisenberg, *State*

Law in Federal Civil Rights Cases: The Proper Scope of Section 1988, 128 U. PA. L. REV. 499 (1980) (giving very different interpretation of Section 1988). Yet neither when codified nor when used as a "fallback rule of thumb" of federal common law, *DelCostello, supra*, —— U.S. at —— n.12, 103 S.Ct. at 2287 n.12, is the doctrine an absolute one to be mechanically applied. State law rules are borrowed out of the need to effectuate federal policies in the face of incomplete federal law, and they are not borrowed if they would incorporate into federal law balances of interests that are inconsistent with the policies underlying the federal action. *See* 42 U.S.C. § 1988; *Tomanio, supra*, 446 U.S. at 487. As the Supreme Court has recently stated, "Federal courts must be ever vigilant to insure that application of state law poses 'no significant threat to any identifiable policy or interest.'" *Burks v. Lasker*, 441 U.S. 471, 479 (1979) (*quoting Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

As this overview of borrowing doctrine shows, the issue presented by the doctrine is neither how to incorporate into federal law as much state law as a federal action will tolerate, nor how best to further state policies and goals in the litigation of a federal action. The issue is how to best effectuate the federal policies embodied in a federal action when the action does not itself supply the complete legal framework necessary to the effectuation of those policies. Because the practice of borrowing presupposes a need to fill a deficiency in the federal scheme, a court must first look to see if there is indeed such a deficiency. *See Cohen v. Board of Education*, 536 F.Supp. 486, 493-495 (S.D. N.Y. 1982).

B. *The Issue of Deficiency*

This case can be resolved on this point. We cannot view the federal scheme for adjudicating constitutional torts as deficient for lack of a notice of claims provision. Nor can we view the District of Columbia's notice of

claims provision as simply embodying certain interests which are not explicitly provided for in the federal scheme, but which nonetheless should be treated as part of that scheme. In short, there is no deficiency in the federal scheme that would lead us to look to 12 D.C. Code § 309 as a possible source of federal law for effectuating federal policies. "State law is to be resorted to in resolving an issue if, and only if, federal law is deficient, and if, and only if, state law 'is not inconsistent with the constitution and the laws of the United States.'" *Jaworski v. Schmidt*, 684 F.2d 498, 500 (7th Cir. 1982) (*quoting Robertson, supra*, 436 U.S. at 702-703), *cert. denied*, —— U.S. ——, 103 S.Ct. 1258 (1983).

Most of the cases involving the limiting of federal causes of action by borrowing state procedural rules have involved the question of whether to borrow state statutes of limitations, tolling policies, or other rules of response that clearly establish the point at which a cause of action ends. *See, e.g., Tomanio, supra* (tolling policies); *Robertson, supra* (survival of action rule); *Johnson, supra* (statutes of limitations). The courts have emphasized the frequent absence of statutes of limitations from federal enactments, the inherently legislative balancing of interests that goes into the determination of a particular period of limitation (making the judiciary particularly unsuited to make such a determination), and the indispensability of such statutes to our ideals of justice. This last point has been well understood from the beginnings of our federal system. For example, in 1805 Chief Justice John Marshall recognized the indispensability of statutes of limitations when he borrowed a federal criminal statute's limitations period and applied it to a federal civil action for debt brought under a statute containing no limitations provision.

> [I]t deserves some consideration, that if [the law] does not limit actions of debt for penalties, those

> actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture.

Adams v. Wood, 6 U.S. (2 Cranch) 336, 341 (1805). The point was more recently emphasized by Justice Rehnquist when he argued for borrowing state statutes of limitations and tolling policies.

> On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations. [They] are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious. * * *

Tomanio, supra, 446 U.S. at 487.

By logic and tradition, the absence of a statute of limitations is an egregious gap in a cause of action. Whatever the source of a cause of action, *some clear end* to one's liberty to commence suit is necessary. Most decisions concerning the borrowing of state law that would burden federal actions have arisen from this need to borrow provisions, such as statutes of limitations, tolling policies, and survival rules, that serve the exclusive

purpose of defining that point where the right to maintain a cause of action ends.[3]

The *McClam* opinion concluded that "[t]he same balancing of interests lies behind the D.C. Code notice provision" as lies behind statutes of limitations—"a balancing of the interest in allowing the prosecution of valid claims against the interest in preventing the prosecution of claims that, because of delay, cannot be fairly litigated." 697 F.2d at 370. Similarly, the District argues that there are no significant differences between a traditional statute of limitations and the D.C. Code's notice provision. Although it is true that Congress was clearly concerned with ensuring the freshness of evidence when it passed 12 D.C. Code § 309, that does not resolve the issue. At a minimum, we must note that a notice provision has a very different relationship to a cause of action

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[3] There is another class of cases in which state law is used to supplement federal enactments. It involves federal enactments in fields that have traditionally been left to state regulation. In those cases, where there is no background of federal law—and indeed where the regulated relationships may even be relationships that are the creations of state law—Congress is not assumed to have ignored those preexisting state legal relationships. In that sense, federal enactments can be assumed to be "incomplete" or "deficient," and state law is commonly borrowed to fill the "gaps." *See, e.g., Burks v. Lasker,* 441 U.S. 471 (1979) (borrowing state law provision regarding corporate directors' power to terminate derivative suits, even where cause of action is federal statute: " 'Corporations are creatures of state law,' and it is state law which is the font of corporate directors' powers." *Id.* at 478 (*quoting Cort v. Ash,* 422 U.S. 66, 84 (1975)). This case does not involve the issue of how to supplement federal legislation of limited scope enacted in a field that has traditionally and primarily been subject to pervasive state regulation. Thus the logic of those cases cannot be the basis of assuming a deficiency in federal law in this case.

than that of a statute of limitations, tolling provision, or survival rule.

No one disputes that if 12 D.C. Code § 309 were applied to a federal cause of action, it would be wholly independent of relevant limitations, tolling, and survival provisions, which would all remain applicable. While these latter provisions all operate to define the point of repose, after which expectations become settled, the notice of claims provision does something different. Of course, if it is not complied with, and there are no grounds for waiver, it bars an action, and thus it acts to create settled expectations; but this is simply a penalty for noncompliance. The provision's function is to compel notice so that the municipal defendant may investigate early, prepare a stronger case, and perhaps reach an early settlement. The need to apply traditional provisions of repose (statutes of limitations, tolling provisions, and survival rules) remains unchanged, since the notice provision has a purpose that is quite distinct.

It is important to our inquiry that a notice of claims provision supplements rather than replaces a traditional statute of limitations and operates in a quite different manner than does such a statute of limitations. Before examining the exact policies served by the provision, we must emphasize that its borrowing does not have the same support in tradition that the borrowing of a statute of limitations would have. This point does not simply rest on a belief in an inherent value to tradition; it rests instead on the fact that borrowing may be explained as a judicial positing of congressional intent. Because statutes of limitations are such universally familiar procedural aspects of litigation, and because they are so generally understood as essential to a fair scheme of litigation, the judiciary is safe in assuming that Congress intended (or at least would have intended) to limit all congressionally created causes of action by statutes of limitations. In

other words, the judiciary can safely look at the absence of a limitations provision as a deficiency.[4]

The judiciary is on less secure ground, however, when it limits statutory or common law causes of action with procedural rules embodying interests that are not as universally understood to be as essential to fair litigation as are the repose interests embodied in traditional statutes of limitations. The absence of such rules in the cause of action cannot as easily be termed a deficiency. Indeed, the ground is less secure even when the rules embody interests similar to those embodied in traditional statutes of limitations but implement those interests in a less universally accepted manner. While the borrowing of state statutes of limitations is supported by both the need for some limitations provision and the tradition of borrowing from state law to supply it, in most other instances the application of local procedural rules that would significantly inhibit the ability to bring federal actions will be neither as reasonable nor as necessary. *Accord* Hill, *supra*, 69 HARV. L. REV. at 91-94.[5]

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[4] If the cause of action is a federal common law action implied by the Constitution, no different analysis is called for. Unless there are reasons to do otherwise, courts should shape federal common law to conform to the general structure of analogous federal statutory litigation. *Cf. Doe v. District of Columbia, supra* note 1, 697 F.2d at 1123 (the law surrounding *Bivens* actions has for the most part assimilated the law surrounding 42 U.S.C. § 1983 actions).

[5] The dissent's understanding of when a deficiency exists in federal law does not appear to incorporate a consideration of the necessity or reasonableness of the type of state rules to be borrowed. According to the dissent, "federal law should be considered 'deficient' and courts should turn to the law of the forum state if federal law does not cover the issue." Dissenting opinion at 6. This approach apparently contemplates that the simple absence of any provision of state law from federal law automatically implies a deficiency in federal law, regardless of whether or not such a provision is in any way necessary or helpful to or even consistent with the execu-

C. *The Role of 12 D.C. Code § 309 in Local Law*

With these considerations in mind, we turn to the District's contention that 12 D.C. Code § 309 should, in spite of its differences, be analogized to a local statute of lim-

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tion of the federal law in question. This interpretation is unsupported by existing case law. *See, e.g., Robertson v. Wegmann*, 436 U.S. 584, 588 (1978) (noting that federal law is "deficient" when it is " 'unsuited or insufficient "to furnish suitable remedies" ' ") (*quoting Moor v. County of Alameda*, 411 U.S. 693, 703, 702 (1973), *quoting* 42 U.S.C. § 1988). *See also Board of Regents v. Tomanio*, 446 U.S. 478, 483-484 (1980) (borrowing state statute of limitations after referring to absence of such statute in federal law as a "void" *and* after citing previous cases that had determined that such an absence warranted borrowing). In essence, existing case law appears to find a deficiency only where the particular type of provision in question is deemed necessary and reasonable. (This determination in turn assumes, though this point is almost too obvious to require statement, that the type of provision is consistent with the federal law at issue. *Cf. infra* at 21-22.) Statutes of limitations, for example, though not directly indicated as necessary by the existence of a federal cause of action, are so universal that their necessity and reasonableness have been accepted.

The dissent also appears to depart from existing case law in its analysis of the appropriateness of the particular provision at issue, which it undertakes after having determined, using the analysis described in the previous paragraph, that a deficiency exists in the federal scheme in question. Relying on the recent Supreme Court case of *Burnett v. Grattan*, the dissent concludes that the notice provision at issue in this case is appropriate for borrowing because of its lack of "functional differences" with the federal cause of action here. Dissenting op. at 15. The dissent's interpretation of *Burnett*, however, does not appear to accurately reflect that case. In *Burnett*, the Supreme Court determined that a particular state statute of limitations was not appropriate for borrowing for two reasons. First, the statute in question was inappropriate when applied to the federal cause of action in the case because it "fail[ed] to take into account practicalities that are involved in litigating" the type of federal claim at issue. *Burnett v. Grattan*, —— U.S. ——, ——, 52 U.S.L.W. 4916, 4919 (June 27, 1984). Second, the statute

itations and thus be adopted as a federal rule of law. To evaluate the argument, we must turn to the role that the provision plays in the local legal scheme—both its method of operation and the interests it serves. In addition to examining the provision's legislative history, which we have done above, we should also examine the District of Columbia courts' understanding of the provision. *See* 11 D.C. Code § 102 (1981) (District of Columbia Court of Appeals is "highest court of the District of Columbia"); *Thompson v. United States*, 548 F.2d 1031, 1035 (D.C. Cir. 1976) (D.C. Court of Appeals rather than this court is final expositor of local law).

In spite of the District's insistence that the provision is closely akin to a statute of limitations, quite a different image emerges from the opinions of the District of Columbia Court of Appeals. That court has refused to view the provision as similar to a statute of limitations. *See Gwinn v. District of Columbia*, 434 A.2d 1376 (D.C.C.A. 1981).

1. 12 D.C. Code § 309 as a condition precedent to the accrual of rights against the municipality.

In *Gwinn*, the District of Columbia Court of Appeals decided that Section 309's notice provision was not sub-

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was inappropriate because the goals it was designed to achieve were inconsistent with the objectives underlying that cause of action. *Id.* at ——, 52 U.S.L.W. at 4919-4920. The dissent's purported application of *Burnett* involves a curious reading of this determination. First, the dissent focuses solely on the "practicalities" part of the analysis and neglects to consider the policy part at all. Second, in performing the "practicalities" part of the analysis, the dissent notes that because none of the particular hindrances to appropriateness mentioned in *Burnett* appear to be present in this case the provision is appropriate. *See* dissenting op. at 15-18. Yet the Supreme Court in *Burnett* found simply that where those particular hindrances were present, a provision was not appropriate to borrow; it did not find that the absence of those hindrances would prove appropriateness. Thus the dissent's analysis of the appropriateness of borrowing the notice provision is both incomplete and erroneous.

ject to those tolling policies that would apply to a statute of limitations. The court's reasoning is particularly significant. The court argued that compliance with the provision was a condition precedent to the very existence of any " 'right of action' or 'entitlement to maintain an action' " for tort damages against the municipality. *Id.* at 1376. This distinguished the provision from a statute of limitations and made the statute of limitations' tolling principles inapposite because they "presuppose[] that a 'right of action' exists and that the claimant is 'entitled to maintain' that action." *Id.* Unless notice is given, according to *Gwinn*, no right of action ever accrues. In effect, under *Gwinn*, compliance with the provision is considered an element in any damage cause of action against the municipality.

The way *Gwinn* characterized the operation of the notice provision makes it more difficult to view it as filling a deficiency in federal law. State law is not usually thought to add elements to federal rights of action. A court may safely posit that federal lawmakers, when setting out the elements of a cause of action, do not usually intend that there should forever remain a remedy available once those elements are established. *See Tomanio, supra*, 446 U.S. at 488. It is much more difficult to assume that those lawmakers, when they set out the elements of a federal cause of action, would normally intend for additional and unstated elements to be also considered necessary, and for state law to be consulted to supply those missing (yet necessary) elements of the federal action. In particular, nothing in federal borrowing doctrine leads us to believe that state law can precondition the accrual of federal rights of action. *Cf. Campbell v. Haverhill*, 155 U.S. 610, 618 (1895) (arguing that a federally created right of action can be limited by a state statute of limitations because "statutes of limitations affect the remedy only, and do not impair the right"); *Bomar v. Keyes*, 162 F.2d 136, 140-141 (2d

Cir.) (Hand, J.) (statutes of limitations are normally treated as going to the remedy and not as a condition to the federal right of action), *cert. denied*, 332 U.S. 825 (1947); *see also Cohen v. Board of Education*, *supra*, 536 F. Supp. at 493-495.

2. 12 D.C. Code § 309 as a condition on the District's waiver of municipal tort immunity.

When we examine the policy reasons given by the District of Columbia Court of Appeals to support its construction and formal characterization of Section 309, we find that those reasons also undermine the argument that it would fill a deficiency in federal law just like a traditional statute of limitations. The District of Columbia Court of Appeals has consistently understood the notice requirement of Section 309 to be a condition placed on the partial waiver of the District's sovereign immunity. *See Gwinn*, *supra*, 434 A.2d at 1378 & n.3; *Kelton v. District of Columbia*, 413 A.2d 919, 920 (D.C.C.A. 1980); *Wilson v. District of Columbia*, 338 A.2d 437, 438 & n.2 (D.C.C.A. 1975). As a matter of local common law the District has waived most of its traditional municipal tort immunity, although it still retains some. *See generally Chandler v. District of Columbia*, 404 A.2d 964, 965 & n.2 (D.C.C.A. 1979) (discussing continued validity of sovereign immunity in District of Columbia law); *Spencer v. General Hospital*, 425 F.2d 479 (D.C. Cir. 1969) (*en banc*) (discussing history of immunity, abandoning "governmental-proprietary" test for defining immunity, and adopting "discretionary function" test for defining immunity); *Elgin v. District of Columbia*, 337 F.2d 152 (D.C. Cir. 1964) (same). The view that 12 D.C. Code § 309 was a condition on the waiver of municipal immunity has influenced the District of Columbia Court of Appeals' construction of that provision. *See, e.g., Gwinn*, *supra*, 434 A.2d at 1378.

To the extent that 12 D.C. Code § 309 accommodates plaintiffs' interests and notions of municipal immunity, it does not correspond to any deficiency in the federal law, nor indeed would it be well-fitted to filling any such deficiency. The role in constitutional tort litigation of state law immunities in general, and municipal immunities in particular, has been the subject of substantial federal law. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Supreme Court held that "[b]y including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed." *Id.* at 647-648 (footnote omitted). Moreover, the Court explicitly discussed the two principal common law theories of municipal immunity—each of which has, at different times, been the basis of the District's municipal immunity—and rejected the proposition that either could limit suits under 42 U.S.C. § 1983. 445 U.S. at 644-650. Even before *Owen* clarified the content of federal law, the Seventh Circuit, in an opinion by Judge (now Justice) Stevens, held that the issue of tort immunity was controlled by uniform federal law rather than by borrowing from state law. *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974). *Hampton* was quoted with approval and its conclusion was apparently adopted in *Owen*'s discussion of the inapplicability of municipal immunity concepts to Section 1983 litigation. 445 U.S. at 647 n.30. *See also Jaworski v. Schmidt, supra*, 684 F.2d 498 (law of immunities relating to constitutional torts is federal law unaffected by state provisions). To import notions of municipal immunity from District of Columbia law into federal civil rights law would be to undermine a federal policy rather than to fill a deficiency in the federal scheme.

IV. Conclusion

For the reasons discussed above, we overrule the panel opinion in *McClam*. We also note that outside of this circuit the overwhelming majority of federal and state courts that have confronted the issue of borrowing notice of claims provisions have reached the same result that we now reach.[6] Joining these courts, we hold that appellant's noncompliance with 12 D.C. Code § 309 cannot bar his federal claims. Accordingly, it was error to grant the District's motion for summary judgment.

Reversed and remanded.

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[6] Cases refusing to borrow notice provisions include: *Rosa v. Cantrell*, 705 F.2d 1208, 1221 (10th Cir. 1982), *cert. denied*, —— U.S. ——, 104 S.Ct. 85 (1983); *Brandon v. Board of Educ.*, 635 F.2d 971, 973 n.2 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *Willis v. Reddin*, 418 F.2d 702 (9th Cir. 1969); *Davis v. Krauss*, 478 F.Supp. 823, 825 (E.D. N.Y. 1979); *Williams v. Posey*, 475 F.Supp. 133 (M.D. Ga. 1979); *Paschall v. Mayone*, 454 F.Supp. 1289, 1298 (S.D. N.Y. 1978); *Perrote v. Percy*, 452 F.Supp. 604 (E.D. Wis. 1978); *Luker v. Nelson*, 341 F.Supp. 111, 118 (N.D. Ill. 1972); *Williams v. Horvath*, 16 Cal.3d 834, 129 Cal.Rptr. 453, 548 P.2d 1125 (1976); *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888, 892 (1982); *Doe v. Ellis*, 103 Wis.2d 581, 309 N.W.2d 375 (1981). For a case holding that a notice provision should be borrowed, *see Mills v. County of Monroe*, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, *cert. denied*, —— U.S. ——, 104 S.Ct. 551 (1983). *Mills* seems to be the only case outside of this jurisdiction holding that a notice provision should be borrowed. The *Mills* opinion, however, partially rests its decision on the unusual flexibility of the relevant New York provision; it was subject to waiver by the court if to waive would promote equity or the action would vindicate "the public interest." Thus, even *Mills* would not support the District's case here.

BORK, *Circuit Judge, dissenting*: I adhere to the result reached in *McClam* v. *Barry*, 697 F.2d 366 (D.C. Cir. 1983), for two reasons. First, the majority's application of section 12-309 to common law torts ignores the extremely broad language and purpose of Congress. Second, the majority improperly interprets the meaning of the "deficiency" requirement of the federal borrowing doctrine, and fails to consider the appropriateness of borrowing this notice-of-claims provision.

I.

That Congress did not specifically consider whether the Act should apply to constitutional torts does not compel the majority's conclusion. "[I]t is no bar to interpreting a statute as applicable that 'the question which is raised on the statute never occurred to the legislature.'" *Eastern Airlines, Inc.* v. *CAB*, 354 F.2d 507, 511 (D.C. Cir. 1965), *quoting* B. Cardozo, *Nature of the Judicial Process* 15 (1921). Both the language and purpose of section 12-309 expressly cover the constitutional claims at issue.[1] As *McClam* points out, "the language of the provision is unquestionably broad; it cannot be read to contain even a hint that it applies only to common-law claims." 697 F.2d at 369. As the majority concedes, "the Act's stated purposes—to provide the District an opportunity to investigate claims when all evidence is still fresh, to allow the District to seek out early settlement of meritorious claims, and generally to protect the District's revenues from unreasonable suits—would certainly be fulfilled all the more by giving the Act

[1] Although at oral argument counsel for the District of Columbia seemingly abandoned this theory, and said that the District's case depended solely on application of the federal borrowing doctrine, I do not believe that I am bound by those representations. Counsel was not abandoning a claim but rather a legal justification for a claim. I agree with the majority that *McClam* correctly focused on two inquiries. Maj. op. at 5.

as broad a reading as its language would allow." Maj. op. at 7. *See Dellums* v. *Powell*, 566 F.2d 216, 230 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Pitts* v. *District of Columbia*, 391 A.2d 803, 807 (D.C. 1978). *See generally* H.R. Rep. No. 2010, 72d Cong., 2d Sess. (1933) ["House Report"]. These purposes "would be significantly undercut by the exclusion from its coverage of all federal or even all constitutional claims for damages." *McClam*, 697 F.2d at 369. Here, the majority removes from the notice provision all "causes of action that . . . are creations of federal law." Maj. op. at 4.

While acknowledging that the words and purpose of the Act are broad enough to cover the case before us, the majority nevertheless limits the applicability of the inclusive language of the Act to common law torts. This limitation is in no way prescribed, or even suggested, by the language of section 12-309. It also conflicts with the expansive reading the District of Columbia courts have given the statute.[2] The majority bases this limitation on the lack of "evidence that Congress envisioned itself to be acting as other than a local legislature protecting a municipality from the threat of excessive common law tort liability." Maj. op. at 8. In fact, the legislative history that the majority claims supports its conclusion speaks to an entirely different issue. Although the House Report did "explicitly analogize[] [the Act] to similar legislation passed in the states to govern other municipalities," maj. op. at 8, that analogy was employed solely for the purpose of defending the period chosen "within which the notice must be filed." House Report at 2. It was not used to justify the bill, nor was it raised in the context of a discussion of the scope of the Act's coverage. The words of the statute are plain, and they

[2] The majority does not question those cases, although it says they have given the statute a "far broader application" than was originally intended. Maj. op. at 8.

clearly cover this case. Absent any evidence on this question, we should not speculate whether Congress was acting in a "local" or "national" capacity. In any case, the common characterization of congressional legislation for the District as local or national has little utility here. Whatever usefulness such terms have when a court examines a question such as whether the equal protection clause requires that Congress' legislation for the District be uniform with its legislation for the nation, *see, e.g., United States* v. *Thompson*, 452 F.2d 1333, 1339-41 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972), such categories do not assist in determining whether Congress intended a notice provision to apply to all causes of action that are covered by the words Congress used.

There seems to be at work here a canon of construction or a line of jurisprudential reasoning with which I am unfamiliar. The majority's position rests upon a distinction between common law tort actions for liquidated damages and actions arising out of federal law for unliquidated damages. But there is no indication whatever that Congress had in mind any such distinction. 1933 was not a year so remote in legal antiquity that Congress must be presumed not to have understood that damage claims could be premised on federal law. Neither then nor at any time since has Congress shown any signs of regret that the plain language it used covered more than common law torts.

That section 12-309 had its genesis in congressional reaction to a recommendation by this court in a case involving a common law tort in no way suggests that the statute's broad language, which covers all damage claims, must be confined to common law torts. Reasoning from the particular to the general is hardly unheard of in law, and it is certainly a form of reasoning not to be denied to legislatures by courts. Had section 12-309 had its origin in a reaction to a case involving a federal cause of action, it is very much to be doubted that the

majority would deny the law any application to common law tort claims. If I am right, this must mean that the court is proceeding on an unarticulated and undefended premise which holds that damage claims arising out of federal law are, in some way left wholly undefined, so different from common law claims that a statute reading on both can be applied only to the latter. I do not know what argument could be constructed to support that conclusion. None appears in the majority's opinion. This court simply says to Congress: you said it; your policy requires it; but we can't believe you meant it.

In the end, all the reader learns is that the majority is unwilling to read "injury or damage" as used in section 12-309 to include "injury or damage" arising out of federal law torts as well as common law torts. This is unfortunate, because the Supreme Court has made clear that, for the purposes of applying local procedural rules,[3] there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 464 (1975). *See McClam* v. *Barry*, 697 F.2d at 373. *A fortiori*, there should be no reluctance to apply a statute enacted by Congress itself.[4]

In sum, the language of section 12-309 covers all torts, whether common law or constitutional. "[T]he absence of any legislative history in point should not outweigh

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[3] *See infra* pp. 10-14 for a discussion of the similarities between notice-of-claims provisions and statutes of limitations.

[4] This inference is further supported by Congress' express provision of similar notice requirements in various federal civil rights laws. *See, e.g.*, 42 U.S.C. § 2000e-5(e) (1982) (requiring notice to EEOC of employment discrimination claim within 180 days of accrual of claim, or within 300 days in certain cases); 29 U.S.C. § 626(d)(1) (1982) (requiring notice to Secretary of Labor of age discrimination claim within 180 days of accrual of claim).

the words of the statute." *See Souder* v. *Brennan*, 367 F. Supp. 808, 812-13 (D.D.C. 1973), *quoted in Breen* v. *District of Columbia*, 400 A.2d 1058, 1061 (D.C. 1979). Moreover, the statute's purpose is undercut by limiting it to constitutional torts, much as its efficacy would have been significantly diminished had it not been extended to intentional torts. *Breen*, 400 A.2d at 1062-63.

II.

Although Congress' express language ought to be dispositive of the issue before us, the same conclusion—that section 12-309 bars the claims before us—is required if we treat the statute as analogous to state law and apply federal borrowing doctrine. That doctrine calls for the following inquiry. We first examine federal law to determine if it is deficient. If federal law does not cover the issue, we must then borrow the law of the forum state, if appropriate, unless that law is inconsistent with federal law. *Burnett* v. *Grattan*, 52 U.S.L.W. 4916, 4918 (U.S. June 27, 1984); 42 U.S.C. § 1988 (1982). Since I think that federal law is deficient and that section 12-309 is both appropriate for this claim and is not inconsistent with any of the relevant federal policies identified by the Supreme Court, I believe section 12-309 should be "borrowed" and applied here.

A.

The majority considers federal law to be "deficient" only if it does not supply a rule that is a "universally familiar procedural aspect[] of litigation," maj. op. at 16,[5] and if federal law does not provide rules that "clearly establish the point at which a cause of action ends." *Id.* at 13. The deficiency requirement, however,

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[5] Even accepting this incorrect view of the law, it is not at all clear that notice-of-claims provisions do not fall into this category. *See infra* pp. 9-14.

does not admit of such a niggardly definition. The cases establish that federal law should be considered "deficient" and courts should turn to the law of the forum state if federal law does not cover the issue. Deficiency, then, has been, and should be, used only in the sense of a "void" in federal law. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-84 (1980). Applying this correct standard, there is clearly a void or deficiency in the common law of constitutional torts that section 12-309 can fill.

The majority engages in an inquiry far different from the one the Supreme Court has specified.[6] In *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), for example, the Court borrowed a state survivorship statute which caused the action to abate, and refused to create a federal common-law rule of survivorship. The Court expressly stated that "[r]esolution of this question turns on whether the state statute is 'inconsistent with the Constitution and laws of the United States.'" 436 U.S. at 585, *quoting* 42 U.S.C. § 1988 (1976). Unlike the majority here, the Court did not engage in a lengthy inquiry as to whether federal law supplied "the complete legal framework necessary to the fair adjudication of federal causes of action." Maj. op. at 10. Nor did the Court consider whether the state survivorship statute is

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[6] Although these cases concerned claims brought under civil rights statutes rather than under the Constitution, the Court's reasoning should apply equally to *Bivens*-type actions, which rest on the same policies as those behind 42 U.S.C. § 1983, the statute in issue in Chardon v. Soto, 103 S. Ct. 2616 (1983), Board of Regents v. Tomanio, 446 U.S. 478 (1980), and Robertson v. Wegmann, 436 U.S. 584 (1978).

Also, as the majority points out, Congress has codified the borrowing doctrine for civil rights statutes in 42 U.S.C. § 1988 (1982), and the Supreme Court has linked this statute to general federal borrowing practices. *Johnson* v. *Railway Express Agency*, 421 U.S. at 464.

a "universally familiar procedural aspect[] of litigation" or whether it is "generally understood as essential to a fair scheme of litigation." *Id.* at 16.

In *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), the Supreme Court also borrowed state law and applied a New York rule precluding tolling of the statute of limitations while an independent action was being pursued. Again, the Court's definition of deficiency is very different from that of the majority:

> Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983—a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly "borrowed" the state law of limitations governing an analogous cause of action.

Tomanio, 446 U.S. at 483-84 (footnote omitted).

More recently, in *Chardon* v. *Soto*, 103 S. Ct. 2611 (1983), the Supreme Court affirmed the application of a local tolling rule providing that the statute of limitations begins to run anew when the tolling period ceases. The Supreme Court began its analysis by stating that "[t]he federal civil rights statutes do not provide for a specific statute of limitations, establish rules regarding the tolling of the limitations period, or prescribe the effect of tolling." *Id.* at 2615. Citing 42 U.S.C. § 1988, the Court noted that "Congress ha[s] plainly instructed the federal courts to refer to state law when federal law provides no rule of decision for actions brought under § 1983." 103 S. Ct. at 2616.

In *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), the Supreme Court borrowed a state statute of limitations, which precluded the plaintiff from bringing a suit under 42 U.S.C. § 1981, one of the civil rights statutes. The Court looked to the limitations period pro-

vided by state law "[s]ince there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under § 1981." 421 U.S. at 462.

The majority also suggests that courts should consider federal law deficient only when it does not provide rules "that clearly establish the point at which a cause of action ends." Maj. op. at 13. Aside from the fact that notice provisions do define such a point, this new requirement is inconsistent with the case law. Federal courts have not, in fact, limited the incorporation of state law to only those rules that state when a cause of action ends. When Congress has not provided a rule of decision for an action brought under section 1983, federal courts have gone on to fashion a range of "remedial details," often by borrowing state law. As the Supreme Court has stated:

> "The implied absorption of State statutes of limitation within the interstices of the federal enactments is a *phase of fashioning remedial details where Congress has not spoken* but left matters for judicial determination within the general framework of familiar legal principles."

Runyon v. *McCrary*, 427 U.S. 160, 180 (1976), *quoting Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946) (emphasis added).

One example of a "remedial detail" with no bearing on the point at which a cause of action ends is the availability of punitive damages. For example, in *Duchense* v. *Sugarman*, 566 F.2d 817, 821 n.2 (2d Cir. 1977), the Second Circuit held that, under state law, the plaintiff's claim for punitive damages did not survive, although the claims for compensatory and nominal damages did. The court was thus using state law to determine, not the end of the underlying cause of action, but the nature and amount of the remedy. *See Jones* v. *Hildebrant*, 191 Colo. 1, 6-8, 550 P.2d 339, 343-45

(1976) (en banc), *cert. dismissed as improvidently granted*, 432 U.S. 183 (1977) (rebutting plaintiff's contention that the only part of a state's wrongful death statute that should be incorporated into federal law is the right to sue, not the state law of damages); *James* v. *Murphy*, 392 F. Supp. 641, 645 (M.D. Ala. 1975) (federal court borrowed state wrongful death act which gave recovery for punitive damages only; the court denied the motion to dismiss and allowed plaintiff, who had sought compensatory damages only, to amend).

The federal law contains no notice-of-claims provision applicable to constitutional torts. The District of Columbia has a notice-of-claims provision applicable to all torts because Congress thought it required by sound policy. That demonstrates a deficiency in the common law of constitutional torts.

That should be the end of the matter. But if a still stronger showing of a deficiency is wanted, that is available as well. I will demonstrate from, 1., the ubiquity of such provisions, 2., their overlap in policy and function with statutes of limitations, and, 3., the special need of municipalities for such provisions, that there can be no doubt that borrowing the District's notice provision cures a deficiency in federal law.

1.

Because they serve a special function, notice provisions commonly apply to claims against government. For that reason, there are fewer notice provisions than there are statutes of limitations, which apply to all claims. But within the category of claims where notice provisions are useful, they are found very frequently indeed. As the majority states, at the time the bill was passed, "[t]he report accompanying the bill pointed out that '[s]imilar statutes are in effect in 32 states.'" Maj. op. at 8, *quoting* House Report at 2. Today, such statutes are found in "most jurisdictions" and notice is "commonly

required." Annot., 51 A.L.R.2d 1132 (1957); 63 C.J.S. *Municipal Corporations* § 923, at 340 (1950). *See* Annot., 59 A.L.R.3d § 2[a], at 97 (1974); 56 Am. Jur. 2d *Municipal Corporations, Counties and Other Political Subdivisions* § 680, at 725 (1971). It may be that, as applied to municipalities, notice provisions meet even the majority's overly restrictive definition of "universally familiar procedural aspects of litigation." I do not belabor that point, however, for it is clear that such provisions, like statutes of limitations, meet a widely felt need in litigation and that federal constitutional common law is "deficient," in the technical sense at issue here, in not having one.

2.

Statutes of limitations and notice-of-claims provisions serve many of the same policies. For example, what the majority quotes Justice Rehnquist to say about the former applies with equal force to the latter.

> The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Tomanio, 446 U.S. at 487. *See Burnett* v. *New York Central R.R.*, 380 U.S. 424, 428 (1965), *quoting Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 348-49 (1944) ("Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. . . .'").

The majority agrees that "Congress was clearly concerned with ensuring the freshness of evidence when it passed 12 D.C. Code § 309," maj. op. at 15, and that therefore this provision shares at least something in common with statutes of limitations. But the majority fails to see that section 12-309 fulfills another, very important purpose of the statute of limitations—that of defining "the point of repose . . . after which expectations become settled." Maj. op. at 16. Section 12-309 gives the city assurance that, if it has learned of only certain claims for the prior six months, it may proceed in the settled expectation that there are no additional outstanding potential liabilities. Knowing its potential exposure, the city may then deal, by investigation, settlement, or litigation with the population of claims as to which it has received notice.

Like statutes of limitations, notice-of-claims provisions go primarily to the remedy. 56 Am. Jur. 2d, *supra*, § 691, at 733. Basically, both involve a legislative "value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson* v. *Railway Express Agency*, 421 U.S. at 463-64.[7] According to the majority, however, section 12-309 is not part of any remedial scheme, but rather "add[s] elements to [a] federal right[] of action." Maj. op. at 20, *citing Gwinn* v. *District of Columbia*, 434 A.2d 1376 (D.C. 1981) (holding that section 12-309 is a condition precedent to the accrual of rights against a municipality). Changing the characterization of the notice statute does not change the reality with which we should

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[7] This conclusion is supported by the frequency with which federal courts look to notice-of-claims provisions to establish the limitations periods where there is no directly applicable statute of limitations. *See, e.g.*, Delcostello v. International Bhd. of Teamsters, 103 S. Ct. 2281, 2287-90 (1983). *Cf.* Zipes v. Trans World Airlines, 455 U.S. 385, 393-96 (1982).

deal: the purpose of the statute and the policies it serves. It would be just as easy to say that filing within the period mandated by the statute of limitations is a condition precedent to maintaining an action for tort damages; that would then appear to add an element to a federal right of action. But this is merely playing with words. The point is that section 12-309 serves the same purpose as a statute of limitations, and that requiring notice within six months is no more "burdensome" on federal interests than is mandating filing within a limitations period. A notice-of-claims provision goes to the remedy in the same way that a statute of limitations does. Any attempt to view it as an element of the cause of action is logically indistinguishable from viewing a statute of limitations that way, too.[8]

3.

Notice-of-claims provisions, like the District's section 12-309, are an adjustment of interests that produces a very fair result. The municipality's need for notice is

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[8] That the D.C. Court of Appeals has understood the notice requirement of § 12-309 to be a condition placed on the partial waiver of the District's sovereign immunity is irrelevant, primarily because it is wrong. The District of Columbia has no sovereign immunity from liability for the non-discretionary acts of its employees which violate the Federal Constitution and laws. Owen v. City of Independence, 445 U.S. 622, 647-48 (1980). *See Dellums* v. *Powell*, 566 F.2d at 229. Having no immunity, the District of Columbia has nothing to waive, and cannot be said to be offending federal law by placing a condition on a waiver of something it does not have. Moreover, the legislative history contains no mention of sovereign immunity. It does not matter, in any event, whether or not one thinks of § 12-309 as a waiver of sovereign immunity. The conceptual origin of the provision is irrelevant given the clear evidence that Congress intended a notice-of-claims provision and could legislate that provision in any way it wished. The concept of sovereign immunity has nothing to do with this suit.

clear. As the New York Court of Appeals has pointed out:

> Requiring notice allows a governmental subdivision a meaningful opportunity to investigate in a timely manner the circumstances that gave rise to a claim. The requirement of notice is one of the safeguards devised by the law to protect municipalities against fraudulent and state claims for injuries to persons and property.

Mills v. *County of Monroe*, 59 N.Y.2d 307, 310-11, 451 N.E.2d 456, 458, *cert. denied*, 104 S. Ct. 551 (1983) (citation and interior quotation marks omitted).

A municipality needs a notice period that is shorter than the ordinary statute of limitations. For one thing, given the very wide range of services and facilities used by the public that a municipality provides, a municipality has many more ways of injuring persons or property without knowing that it has done so than does any particular agent of the municipality or any individual or business. Because of the extensive and segmented bureaucracy that the provision of so many and so varied services and facilities requires, a city, particularly a major city like Washington, D.C., will often not receive timely and adequate notice of a likely claim from its own employees, even assuming that there is an employee who knows of a likely claim. The one person who is sure to know is the individual who thinks the city has in some tortious way injured his person or property. It makes eminent good sense, then, to require notice to the city within six months so that the facts may be investigated before they go stale, good claims paid, marginal claims compromised, and worthless claims shown to be such.

On the other hand, section 12-309 does not burden the claimant in his preparation for litigation. He need not prepare the facts and pleadings necessary to litigation within the six-month notice period. He need only give notice of "the approximate time, place, cause, and cir-

cumstances of the injury or damage." A handwritten note will do, or, as the statute provides, a police report of the incident. After that, the claimant has the full period of the statute of limitations to file his claim in court, if the claim has not been settled.

It is apparent, then, that section 12-309 applies many of the policies of a statute of limitations to the special needs of a municipality, but does so with the minimum burden on the litigating needs of the claimant. It is ironic that, at least under the majority's analysis, the statute would have had a better chance of being borrowed and applied if it were a true statute of limitations, and hence more burdensome to the assertion of rights in court, rather than a notice provision serving the same purposes less harshly.

B.

The appropriateness of applying section 12-309 to this lawsuit may be shown by applying the analysis followed by the Supreme Court in the recent case of *Burnett* v. *Grattan*, 52 U.S.L.W. 4916 (U.S. June 27, 1984). There the Court decided in the negative the question "whether a state law, establishing a procedure for administrative resolution of employment discrimination complaints, provides an appropriate statute of limitations for actions brought under the Reconstruction-era Civil Rights Acts, 42 U.S.C. § 1981 *et seq.*" *Burnett*, 52 U.S.L.W. at 4917. Respondents Grattan and Hedman, white employees of a predominantly black college in Maryland, were told their contracts would not be renewed because of dissatisfaction with their work. They filed a suit against various officers of the college, alleging racial and gender discrimination. The district court dismissed the suit as barred by the applicable statute of limitations, Md. Ann. Code, Art. 49B, § 9(a). Because there was no limitation period provided by the federal statutes, the court borrowed a six-month limitation period from a state statute

prohibiting discriminatory practices in employment. The court of appeals reversed, holding that a three-year statute of limitations should be chosen.

The Supreme Court affirmed because "functional differences" between the federal causes of action and the state administrative law made Article 49B an inappropriate statute of limitations to borrow. 52 U.S.L.W. at 4918. "A state law is not 'appropriate,'" the Court said, "if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts." *Id.* at 4919. The Court's analysis of the "functional" characteristics and "practicalities" involved demonstrates the appropriateness of borrowing section 12-309 for litigation against the District of Columbia.

The Court set out the characteristics of the federal law with which the characteristics of the state law were to be compared.

> In the Civil Rights Acts, Congress established causes of action arising out of rights and duties under the Constitution and federal statutes. These causes of action exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable in the first instance. The statutes are characterized by broadly inclusive language. They do not limit who may bring suit, do not limit the cause of action to a circumscribed set of facts, nor do they preclude money damages or injunctive relief. An appropriate limitations period must be responsive to these characteristics of litigation under the federal statutes.

52 U.S.L.W. at 4918-19.

The Court began "with the observation that borrowing an administrative statute of limitations ignores the dominant characteristic of civil rights actions: they be-

long in court." 52 U.S.L.W. at 4919. This meant attention to the complexities of preparing and initiating litigation and to the responsibilities that follow hard upon filing, such as being prepared to cope with motions and discovery. By contrast, under Maryland's administrative scheme, a complainant had merely to make and sign a complaint under oath and file it with the state's Human Relations Commission. *Id.* The complaint need contain only the name and address of the person or entity alleged to have discriminated and the particulars of the discrimination. The Supreme Court said that

> [w]hen a legislature selects a statute of limitations to govern a particular cause of action, it takes into account the burdens borne by the parties to a suit of that sort. . . . The time limit established by the Maryland legislature reflects in part the minimal burden state law places on the administrative complaint, which does not correspond in any significant way to the substantial burden federal law places on a civil rights litigant.

Id. (footnote omitted). This legislative recognition of the difference led the legislature to choose a six-month limit for filing a grievance but gave the Human Relations Commission, which assumed the role of a litigant upon receiving a complaint, an additional two years in which to investigate, negotiate, settle, or bring formal charges against an employer.

The parallels to the statutory scheme provided by Congress for the District of Columbia are obvious—and those parallels all lead to the conclusion that here the borrowing is entirely appropriate. I will trace the application of the Supreme Court's rationale to this case.

The tort claims governed by section 12-309, like claims brought under federal civil rights statutes, "belong in court." To use *Burnett*'s criteria, both are judicially enforceable in the first instance; both are characterized

by broadly inclusive language; neither limits who may bring suit; neither limits the cause of action to a circumscribed set of facts nor precludes money damages or injunctive relief. The tort claimant in the District of Columbia, if he must comply with section 12-309, at that stage bears none of the burdens of a litigant. Even if a police report has not relieved him of any obligation, the notice a plaintiff must file within six months is less burdensome than the sworn complaint the complainant must file within six months with Maryland's Human Relations Commission. The Court noted that, as a litigant, the Human Relations Commission had an additional two years to act. In our case, once the notice is filed, the torts claimant, under the facts here, has an additional two-and-one-half years to investigate, negotiate, settle, or sue. Congress has taken into account the differing burdens involved in filing a notice and preparing for litigation and provided appropriate time periods for each.

The Supreme Court also rejected the six-month administrative time limit in *Burnett* v. *Grattan* because

> [t]he divergence between the goals of the federal civil rights statutes and of the state employment discrimination administrative statute is clear in the present case. The goals of the federal statutes are compensation of persons whose civil rights have been violated, and prevention of the abuse of state power. *Board of Regents* v. *Tomanio*, 446 U.S., at 488; *Robertson* v. *Wegmann*, 436 U.S. 584, 590-591 (1978). That these are not the goals of the statute empowering Maryland's administrative agency to resolve employment discrimination compiaints is apparent both because the remedial authority of the agency is limited, and because the state scheme does not create a private right of action. The stated goal of the state administrative procedure is the prompt identification and resolution of employment disputes. The administrative scheme, including a short statute of limitations, encourages conciliation and private

> settlement through the agency's intervention in live disputes.

Id. at 4919-20 (footnotes omitted).

Here, section 12-309 aids the prompt identification and resolution of disputes but it does not set a short time limit on the right to file suit. Appellant in this case had three years to file suit. Taken together, then—as they must be if "functional" characteristics and "practicalities" are to be compared—section 12-309's six-month notice period and the three-year statute of limitations applicable to appellant Brown have the same distribution of burdens and benefits as those the Court thought appropriate in *Burnett*. Six months is appropriate for a notice provision, but a longer period—there an additional two years, here an additional two-and-one-half years—is appropriate for a limitation on the filing of litigation because the burdens of initiating litigation are much greater than those of filing a notice. Under the rationale of *Burnett*, Congress behaved entirely correctly in enacting section 12-309 as a notice period and three years as the statute of limitations. There can be no doubt that section 12-309 is an "appropriate" notice period to borrow.

C.

Having demonstrated that federal law is deficient under either of the two possible definitions of "deficiency" and that six months is an appropriate period to borrow, we need only consider whether section 12-309 is inconsistent with federal law. *See supra* p. 5.

The Supreme Court has identified four policies for a federal court to consider in deciding whether to borrow a local procedural rule serving the policy of repose: deterrence, compensation, uniformity and federalism. *Chardon* v. *Soto*, 103 S. Ct. at 2616. None of these policies would be offended by the application of section 12-309.

I note at the outset the Supreme Court has often stated that "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." *Robertson* v. *Wegmann*, 436 U.S. at 593. *See id.* at 594-95 ("[T]he mere fact of abatement is not sufficient ground to declare state law 'inconsistent' with federal law."). We must, therefore, consider the specific effect of section 12-309 on each of these four policies.

Neither the policy of deterrence nor of compensation would be undercut by application of 12-309 "since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by" providing notice of their claim within six months. *Tomanio*, 446 U.S. at 488. *Cf. Burnett* v. *Grattan*, 52 U.S.L.W. at 4919 (noting the minor "practical difficulties" facing those who need only make, sign and file a complaint within six months). Similarly, there is no need for uniformity here. The Supreme Court has repeatedly refused to put aside state law for the sake of formulating or applying uniform federal rules in civil rights actions. For example, in *Tomanio*, the Court said that "[t]he need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions." 446 U.S. at 489. And in *Robertson* v. *Wegmann*, the Court held

> [W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state

> law obviously means that there will not be nationwide uniformity on these issues.

436 U.S. at 594 n.11. *See Chardon* v. *Soto*, 103 S. Ct. at 2619.

Finally, applying section 12-309 does not impede the goal of federalism. The policy of repose served by the Act is important to the federal as well as the state system. *Tomanio*, 446 U.S. at 488. As pointed out above, *see* p. 10, *supra*, this statute ensures freshness of the evidence and helps prevent against unreasonable claims. It promotes justice. *Burnett* v. *New York Central R.R.*, 380 U.S. at 428. It is not unreasonably short. Indeed, many other civil rights statutes have a similar, and sometimes shorter, notice requirement. *See, e.g.*, statutes cited in note 4, *supra*.

Nor is the goal of federalism offended by borrowing a statute that applies only to a governmental entity. In *Aitchison* v. *Raffiani*, 708 F.2d 96, 100-03 (3d Cir. 1983), and *Kosikowski* v. *Bourne*, 659 F.2d 105 (9th Cir. 1981), the Third Circuit and the Ninth Circuit borrowed limitations periods from state tort claims acts. The Third Circuit held that

> [i]t is not unreasonable for a state to assume that the public interest in the repose of claims against a governmental agency is worthy of special consideration. Also, the problem of preserving evidence may be more difficult when the defendant is an elected body whose members serve relatively short terms.

708 F.2d at 103. Here, Congress made that assumption and determined that the District of Columbia has a right to be notified of claims to be brought against it within six months.[9]

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[9] The fact that Congress and not a state legislature enacted § 12-309 is of course not dispositive in the context of the federal borrowing doctrine, if the District of Columbia's provision is treated as a state law.

That the purpose of constitutional tort claims is to augment remedies against government subdivisions and officials does not mean that notice provisions are inconsistent with federal law. As the majority states, some limitation of remedy is always necessary. Therefore, especially where the policies a state law serves are so close to those of a statute of limitations and where the time period is not inappropriate, absent any congressional direction, federal courts ought not to substitute their own judgment for that of the state legislature.

The policies permitting recovery for constitutional torts do not require that we apply only the farthest reaching remedy. Both Congress—in enacting section 1988—and the Supreme Court have made clear that state law is to be our "primary guide" in this area. *Johnson* v. *Railway Express Agency*, 421 U.S. at 465. I dissent today because the majority ignores that injunction as well as Congress' express language and purpose in enacting section 12-309. I believe the grant of the District's motion for summary judgment should be affirmed.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2083

KENNETH M. BROWN, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

BEFORE: ROBINSON, *Chief Judge,* WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA AND STARR, *Circuit Judges,*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof, It is ordered and adjudged by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed and this case is remanded, all in accordance with the Opinion of the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2083

KENNETH M. BROWN, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

BEFORE: WRIGHT, EDWARDS, AND BORK, *Circuit Judges,*

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and briefs were filed by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). On consideration of the foregoing it is

ORDERD and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause be and hereby is affirmed. *See McClam* v. *Barry,* 697 F.2d 366 (D.C. Cir. 1983).

It is FURTHER ORDERED, by this Court, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 14, as amended November 30, 1981 and June 15, 1982.

Per Curiam
For The Court

GEORGE A. FISHER, *Clerk*
By: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

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APPENDIX D

United States District Court

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 79-2809

KENNETH M. BROWN, ET AL., *Plaintiff*

v.

DISTRICT OF COLUMBIA, ET AL. *Defendants.*

MEMORANDUM ORDER

This matter is before the court on defendants'[1] motion for summary judgment. Plaintiffs Kenneth M. Brown and Riggie A. Lott brought this action for declaratory and injunctive relief and one million dollars in damages, alleging that the conditions of their confinement in the Adjustment Unit at Lorton's Youth Center One violated the first, fifth, eighth, and fourteenth amendments. Jurisdiction is based on 28 U.S.C. § 1331.[2] Defendants have moved for summary judgment, and plaintiffs have filed no opposition. For the reasons that follow, we conclude that defendants are entitled to summary judgment.

Defendants argue, first, that Brown's claims for declaratory and injunctive relief are moot. We agree. Brown has been transferred to a federal institution at Petersburg,

[1] Defs making this motion are the District of Columbia, Marion S. Barry, Delbert C. Jackson, Charles M. Rogers, Marion D. Strickland, James T. Black, Charles S. Lindsay, William A. Boone, and Albert A. Tumminia. The federal defendants were dismissed form the action on October 21, 1980. Defendants Rogers and Black join in the motion for summary judgment after showing cause on July 16, 1981, why they should not be held in default.

[2] Defendants' argument that plaintiffs have cited no adequate jusisdictional basis for this action overlooks paragraph 3 of plaintiffs'complaint.

Virginia. *See* Brown's Letter to Court, filed January 2, 1981. *See also* Affidavit of Walter B. Ridley, Exhibit A to Defendants' Memorandum. Thus the conditions of his confinement at Lorton are no longer in issue. *See Brown v. District of Columbia*, Civil Action No. 79-2230 (D.D.C., order of January 30, 1981); *Brown v. United States*, Civil Action No. 80-917 (D.D.C., Order of June 25, 1981).

Second, defendants assert that plaintiffs' claims for damages are barred by their failure to comply with the mandatory notice provisions of District of Columbia Code § 12-309 (1973). Again, we agree. Section 12-309 provides:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner [now the Mayor] of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under this section.

The duty to provide notice under § 12-309 attaches as soon as the plaintiff suffers actionable injury. *DeKine v. District of Columbia*, 422 A.2d 981, 987 (D.C. App. 1980). Section 12-309 is mandatory and is to be strictly construed. *Boone v. District of Columbia*, 294 F. Supp. 1156, 1157 (D.D.C. 1968); *Pitts v. District of Columbia*, 391 A.2d 803, 807 (D.C.App. 1978). Since plaintiffs failed to meet the requirements of § 12-309, Affidavit of David W. Harper, Exhibit B to Defendants' Memorandum, their claims for damages must be dismissed.[3]

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[3] The complaint alleges that Brown was last confined in the Adjustment Unit on April 3, 1979. Even assuming that the complaint itself constitutes notice for purposes of § 12-309, *cf.* Eskridge v. Jackson, 401 A.2d 986, 988-89 n. 5 (D.C.App. 1979), its filing on October 17, 1979, was not within the six month period.

As plaintiff Lott has made no appearance in this action for more than nineteen months, his claims must be dismissed for want of prosecution. See Local Rule 1-14.

For these reasons,[4] it is by the court this 2nd of September, 1981,

ORDERED that defendants' Motion for Summary Judgment be and the same hereby is granted with respect to plaintiffs' claims for damages and plaintiff Brown's claim for declaratory and injunctive relief; and it is

ORDERED that plaintiff Lott's claims for declaratory and injunctive relief be and the same hereby are dismissed for want of prosecution; and it is

FURTHER ORDERED that this action shall stand dismissed.

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

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[4] We need not reach defendants' arguments as to abstention and sufficiency of allegations of wrongdoing.